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Jan 18

13.

REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS OF TEXAS

DURING THE

ENTIRE TYLER TERM, 1887, AND THE FIRST
PART OF THE GALVESTON
TERM, 1888.

REPORTED BY
JACKSON & JACKSON.

VOLUME XXIV.

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COURT OF APPEALS OF THE STATE OF TEXAS.

PRESIDING JUDGE:

HON. JOHN P. WHITE.

JUDGES:

HON. JAMES M. HURT.

HON. SAMUEL A. WILLSON.

ATTORNEY GENERAL:

JAMES S. HOGG, Esq.

ASSISTANT ATTORNEY GENERAL:

W. L. DAVIDSON, Esq.

CLERKS:

JAMES L. WHITE, AT AUSTIN.

E. P. SMITH, AT TYLER.

H. A. MORSE, AT GALVESTON.

REPORTERS:

A. M. JACKSON.

A. M. JACKSON, JR.

PREFATORY NOTE.

The cases of *L. A. Lott v. The State*, appealed from Gonzales county, and *Ned Anderson v. The State*, appealed from Henderson county, and decided at earlier terms of the court, by some oversight, have been omitted from the volumes of the Reports to which they properly pertain. By direction of the court, they are now published in the appendix to this volume.

Attention is invited to the tabulated statements in this volume showing the work of the Court from its organization in May, 1876, to the thirty-first of December, 1887.

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AT THE TYLER TERM, 1897.

<i>Style of case.</i>	<i>County.</i>	<i>Offense.</i>	<i>Punish.</i>	<i>Disposition.</i>
A.				
Abbott v. State.....	Tyler.....	Murder.....	Life	Dismissed.
Ard v. State.....	Houston.....	Assault to murder.....	3 years	Affirmed.
B.				
Barkley v. State.....	Bexar.....	Burglary	2 years.....	Affirmed.
Berry v. State.....	Colorado	Burglary	2 years	Affirmed.
Blair v. State.....	Fort Bend	Felony theft	2 years.....	Affirmed.
Boykin v. State.....	Williamson	Swindling	2 years.....	Affirmed.
Brown v. State.....	Baylor	Murder second degree.....	2 years.....	Affirmed.
Brumley v. State.....	Wise.....	Embezzlement	5 years.....	Affirmed.
Brumley v. State.....	Wise.....	Removing mort. prop.....	2 years.....	Affirmed.
Burns v. State.....	Gonzales	Felony theft	8 years.....	Affirmed.
C.				
Campbell v. State.....	Lavaca.....	Felony theft.....	2 years.....	Affirmed.
Chandler v. State.....	Rockwall.....	Misdemeanor	\$5 fine	Dismissed.
Clark v. State.	Fannin.....	Felony theft	2 years.....	Affirmed.
Condray v. State.....	Jack.....	Felony theft	3½ years.....	Affirmed.
Cooke v. State.....	Cherokee.....	Misdemeanor.....	\$25 fine.....	Affirmed.
Cyphers v. State.....	Polk.....	Manslaughter	2 years.....	Affirmed.
D.				
Davis v. State.....	Wood.....	Misdemeanor.....	\$25 fine.....	Affirmed.
Dewberry v. State.....	Henderson...	Assault to murder.....	5 years.....	Affirmed.
Deritt v. State.....	Houston.....	Rape	30 years	Affirmed.
E.				
Ellison v. State.....	Caldwell	Assault to rape.....	2 years.....	Dismissed.
Ensall v. State.....	Travis	Felony theft	10 years.....	Affirmed.
Evans v. State.....	Gregg.....	Misdemeanor.....	\$25 fine.....	Dismissed.
F.				
Flagg v. State.....	Van Zandt	Misdemeanor	\$25 fine.....	Affirmed.
Faber v. State.....	Maverick	Perjury	5 years.....	Dismissed.
Ford v. State.....	Marion	Felony	5 years.....	Dismissed.
Ford v. State.....	Houston	Assault to rape.....	5 years.....	Affirmed.
G.				
Garcia v. State.....	Wilson	Felony theft	10 years.....	Affirmed.
Gay v. State.....	Rusk.....	Misdemeanor.....	\$25 & 30 days....	Affirmed.
Gear v. State.....	Lampasas....	Felony theft	8 years.....	Affirmed.

Causes decided without written opinion.

<i>Style of case.</i>	<i>County.</i>	<i>Offense.</i>	<i>Penalty.</i>	<i>Disposition.</i>
Gregory v. State.....	Lamar	Forgery	2 years.....	Affirmed.
Gregory v. State.....	Lamar	Forgery	2 years.....	Affirmed.
Guygenheimer v. State..	Van Zandt..	Misdemeanor.....	\$25 fine.....	Dismissed
H.				
Hadden v. State.....	Lamar	Embezzlement	2 years.....	Affirmed.
Haney v. State.....	Rusk.....	Misdemeanor.....	\$25 fine.....	Affirmed.
Hendry v. State.....	Mason	Felony theft.....	7 years....	Dismissed.
Hinopasa v. State.....	Duval.....	Assault to murder....	2 years.....	Affirmed.
Hork v. State.....	Wood.....	Felony theft	2 years.....	Affirmed.
Huff v. State.....	Hopkins.....	Assault to murder	2 years	Affirmed.
J.				
Jackson v. State.....	Hunt.....	Misdemeanor.....	\$50 fine.....	Affirmed.
Jackson v. State.....	Harris	Burglary	2 years.....	Affirmed.
Jackson v. State.....	Robertson ..	Manslaughter	2 years.....	Affirmed.
Jackson v. State.....	Lamar	Felony	5 years.....	Affirmed.
Johnson v. State	Hopkins.....	Assault to murder	2 years.	Affirmed.
K.				
Kegans, Ex parte.....	Harris	Hab. corp. for bail....	Refused.....	Affirmed.
King v. State.....	Falls	Murder second degree ..	\$10	Affirmed.
Krester v. State	Lavaca.....	Felony theft.....	2 years.....	Affirmed.
L.				
Lewis v. State.....	Bowie	Felony theft	2 years.....	Affirmed.
Lusten v. State.....	Marion	Scire facias.....	\$100 judgment..	Dismissed.
M.				
McConnell v. State.....	Parker	Manslaughter	4 years.....	Affirmed.
McDaniel v. State.....	Uvalde.....	Felony theft	2 years.....	Affirmed.
Middleton v. State.....	Lavaca.....	Felony theft	5 years.....	Affirmed.
Miller v. State.....	McLennan..	Felony theft	2 years.....	Affirmed.
Moore v. State ...	McLennan..	Felony theft	7 years.....	Affirmed.
N.				
Neiderluck alias Miller Bexar.....		Burglary	6 years.....	Affirmed.
v. State.				
O.				
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P.				
Patello v. State.....	Bosque.....	Felony ...	5 years.....	Affirmed.
R.				
Reiger v. State.....	Montague....	Assault to murder.....	2 years	Affirmed.
Rose v. State.....	Wilson.....	Felony theft.....	\$10	Affirmed.
S.				
Saldinas v. State.....	Cameron ...	Assault to murder.....	2 years.....	Affirmed.
Salinas v. State.....	Duval.....	Assault to murder.....	2 years.....	Affirmed.
Schmidt v. State.....	Fayette	Hab. corp. for bail	Refused	Affirmed.
Simmons v. State.....	Freestone ..	Assault to murder.....	2 years.....	Affirmed.
Sissell v. State	Delta.....	Misdemeanor.....	\$25 fine.....	Dismissed.
Smith v. State	Cooke.....	Felony theft	2½ years.....	Affirmed.
Smith et al. v. State....	Shelby.....	Scire facias	\$500 judgment..	Affirmed.
Smith v. State.....	Marion.....	Misdemeanor.....	\$100 fine.....	Affirmed.

 Causes decided without written opinion.

<i>Style of case.</i>	<i>County.</i>	<i>Offense.</i>	<i>Penalty.</i>	<i>Disposition.</i>
Snell v. State.....	Rains.....	Misdemeanor.....	\$25 fine.....	Affirmed.
Starnes v. State.....	Upshur.....	Misdemeanor.....	\$5 & 1 day.....	Affirmed.
Stevens v. State.....	Upshur.....	Misdemeanor.....	\$5 fine.....	Affirmed.
Statler v. State.....	Van Zandt...	Misdemeanor.....	\$25 fine.....	Dismissed.
Stewart v. State.....	Fort Bend...	Seduction.....	3 years.....	Affirmed.
Stewart v. State.....	Fort Bend...	Burglary.....	2 years.....	Affirmed.
Stubbs, Ex parte.....	Palo Pinto...	Hab. corp for discharge.	Refused.....	Affirmed.
Stevdy v. State.....	Lamar.....	Bringing stolen property	5 years.....	Affirmed.
		to the State.		
Sullivan v. State.....	Rains.....	Felony theft.....	2 years.....	Affirmed.
T.				
Thumm v. State.....	Medina..	Habeas corp. for ball..	Refused.....	Affirmed.
Tutton v. State...	Montague....	Aid'g escape of prisoner.	3 years.....	Affirmed.
V.				
Veatch et al. v. State...	Kaufman...	Scire facias.....	\$100 judgment..	Affirmed.
W.				
Wallace v. State.....	Hopkins....	Assault to murder.....	4 years.....	Affirmed.
Williams v. State.....	Hunt.....	Misdemeanor.....		Affirmed.
Williams v. State.....	Fort Bend...	Felony theft.....	3 years.....	Affirmed.
Williams v. State.....	Fort Bend...	Felony theft.....	2 years.....	Affirmed.
Wilson v. State.....	Colorado....	Felony theft.....	2 years.....	Affirmed.
Wortham v. State.....	Houston....	Felony.....	7 years.....	Affirmed.

CONDENSED STATEMENT.

Condensed statement of cases decided by the Court of Appeals of Texas, at the Austin branch, since the organization of the Court, in May, 1876, until the close of the term of 1887.

Term.	Nature of cases.	Affirmed. Written opinion.	Affirmed. Oral opinion.	Appeal dismissed. Written opinion.	Appeal dismissed. Oral opinion.	Reversed and remanded and Reversed and dismissed.	Totals.
1876	Felonies	19	....	3	....	21	43
	Misdemeanors	5	....	3	....	....	8
	Habeas corpus	3	....	....	....	3	6
	Scire facias .....	....	....	....	....	....	....
	Civil cases	3	10	....	....	2	15
	Grand total	30	10	5	....	26	71
1877	Felonies	26	3	3	37	39	108
	Misdemeanors	32	1	7	28	11	79
	Habeas corpus	7	....	....	....	....	7
	Scire facias .....	....	....	....	2	1	3
	Civil cases	21	24	....	18	21	84
	Grand total	86	28	10	85	72	281
1878	Felonies	43	3	3	3	29	84
	Misdemeanors	41	2	1	13	25	82
	Habeas Corpus	3	1	....	....	....	4
	Scire facias	2	2	2	4	3	13
	Civil cases	1	52	3	30	21	107
	Grand total	95	59	9	49	78	290
1879	Felonies	39	....	....	24	23	86
	Misdemeanors	24	....	....	10	19	53
	Habeas corpus	1	....	....	....	3	3
	Scire facias	1	1	....	2	7	11
	Civil cases	1	12	....	29	4	46
	Grand total	66	13	....	65	55	199

Condensed statement.

Term.	Nature of case.	Affirmed. Written opinion.	Affirmed. Oral opinion.	Appeal dismissed. Written opinion.	Appeal dismissed. Oral opinion.	Reversed and remanded and Reversed and dismissed.	Totals.
1880	Felonies.....	89	81	....	6	51	127
	Misdemeanors.....	5	24	1	23	83	85
	Habeas corpus.....	....	1	....	2	....	3
	Scire facias.....	1	2	....	2	....	5
	Civil cases.....	2	47	....	33	16	98
	Civil cases on report of Com'rs of App...	20	....	....	....	21	41
	Grand total.....	67	105	1	65	121	359
1881	Felonies.....	17	38	....	9	82	98
	Misdemeanors.....	6	27	....	9	85	77
	Habeas corpus.....	1	1	....	....	2	4
	Scire facias.....	1	2	....	6	2	12
	Civil cases.....	3	41	1	27	18	90
	Civil cases on report of Com'rs of App...	26	....	....	4	48	73
	Grand total.....	56	110	1	55	132	354
1882	Felonies.....	8	59	....	5	51	123
	Misdemeanors.....	10	33	....	17	43	102
	Habeas corpus.....	1	....	....	....	1	2
	Scire facias.....	....	....	....	....	1	3
	Civil cases.....	3	15	1	18	8	40
	Civil cases on report of Com'rs of App...	9	....	1	....	7	17
	Grand total.....	31	107	2	42	116	298
1883	Felonies.....	16	46	1	7	35	105
	Misdemeanors.....	3	28	1	10	43	85
	Habeas corpus.....	1	1	....	....	1	3
	Scire facias.....	....	5	....	2	8	15
	Civil cases.....	15	53	....	18	51	137
	Civil cases on report of Com'rs of App...	1	...	....	....	1	2
	Grand total.....	36	133	2	32	139	347
1884	Felonies.....	14	64	....	11	41	130
	Misdemeanors.....	5	24	....	18	39	86
	Habeas corpus.....	2	1	....	....	1	4
	Scire facias.....	4	6	....	....	5	15
	Civil cases.....	21	85	2	10	30	98
	Civil cases on report of Com'rs of App...	1	....	....	....	1	3
	Grand total.....	47	130	2	39	117	335

Condensed statement.

Term.	Nature of case.	Affirmed. Written opinion.	Affirmed. Oral opinion.	Appeal dismissed. Written opinion.	Appeal dismissed. Oral opinion.	Reversed and remanded and Reversed and dismissed.	Totals.
1885	Felonies	18	49	....	4	56	122
	Misdemeanors	3	83	....	14	29	79
	Habeas corpus	2	....	....	1	3	6
	Scire facias	2	2	....	2	2	8
	Civil cases	32	28	1	16	69	116
	Civil cases on report of Com'rs of App...	16	....	....	....	14	30
	Grand total	68	112	1	37	148	361
1886	Felonies	20	85	....	5	49	159
	Misdemeanors	5	55	....	15	45	120
	Habeas corpus .....	....	5	....	....	2	7
	Scire facias .....	....	1	....	1	8	10
	Civil cases .....	....	53	....	15	14	82
	Grand total	25	199	....	36	118	378
1887	Felonies	25	88	....	5	30	148
	Misdemeanors	7	37	....	39	33	116
	Habeas corpus	1	....	....	2	8	6
	Scire facias	3	....	....	4	1	8
	Civil cases	7	68	....	24	45	144
	Grand total	43	193	....	74	119	442

Austin Branch Summary.

Felonies, 1876 to 1887, inclusive	286	465	9	115	457	1332
Misdemeanors, 1876 to 1887, inclusive	146	264	13	195	354	972
Habeas corpus, 1876 to 1887, inclusive	22	10	....	5	18	55
Scire facias, 1876 to 1887, inclusive	14	22	2	32	44	114
Civil cases, 1876 to 1887, inclusive	109	419	8	231	269	1036
Civil cases on report Commissioners of Appeals, 1880 to 1885, inclusive	658	1180	37	578	1229	3674

Condensed statement.

CONDENSED STATEMENT OF CASES

Decided by the Court of Appeals of Texas, at the Tyler Branch of the Court, since its organization in 1876 to the close of the term of 1887.

Term.	Nature of cases.	Affirmed. Written opinion.	Affirmed. Oral opinion.	Appeal dismissed. Written opinion.	Appeal dismissed. Oral opinion.	Reversed and remanded and reversed and dismissed.	Totals.
1876	Felonies	6	....	1	8	23	38
	Misdemeanors	6	....	1	1	2	10
	Habeas corpus	2	....	....	....	....	2
	Scire facias .....	....	....	....	....	....	....
	Civil cases	7	1	9	....	8	25
	Grand total	21	1	11	9	33	75
1877	Felonies	20	1	3	3	22	49
	Misdemeanors	25	....	4	4	21	54
	Habeas corpus	7	....	....	....	4	11
	Scire facias .....	....	....	1	3	2	6
	Civil cases	7	17	3	9	10	46
	Grand total	59	18	11	19	59	166
1878	Felonies	23	....	8	....	19	50
	Misdemeanors	12	3	....	1	23	39
	Habeas corpus	3	....	....	....	....	3
	Scire facias	1	....	....	1	5	7
	Civil cases	5	26	4	4	14	63
	Grand total	44	39	12	6	61	162
1879	Felonies	40	....	1	12	33	86
	Misdemeanors	20	....	2	9	15	46
	Habeas corpus .....	....	....	1	1	1	3
	Scire facias .....	....	....	....	3	6	9
	Civil cases	1	9	2	9	3	24
	Grand total	61	9	6	34	58	168

Condensed statement.

Term.	Nature of cases.	Affirmed. Written opinion.	Affirmed. Oral opinion.	Appeal dismissed. Written opinion.	Appeal dismissed. Oral opinion.	Reversed and remanded and Reversed and dismissed.	Total.
1880	Felonies.....	31	30	....	4	34	89
	Misdemeanors.....	6	5	....	5	18	35
	Habeas corpus.....	2	....	....	....	1	3
	Scire facias.....	4	....	....	11	8	23
	Civil cases.....	3	33	....	10	17	63
	Grand total.....	35	68	....	30	79	212
1881	Felonies.....	9	44	....	4	25	82
	Misdemeanors.....	3	7	....	6	16	32
	Habeas corpus.....	2	....	....	....	....	2
	Scire facias.....	....	5	....	3	3	10
	Civil cases.....	28	38	....	5	41	107
	Grand total.....	10	108	....	21	95	229
1882	Felonies.....	8	23	....	3	33	72
	Misdemeanors.....	1	9	....	4	8	22
	Habeas corpus.....	....	3	....	1	....	4
	Scire facias.....	....	....	....	4	4	8
	Civil cases.....	1	63	....	9	50	123
	Grand total.....	10	108	....	21	95	229
1883	Felonies.....	18	47	....	7	28	100
	Misdemeanors.....	1	12	....	1	12	26
	Habeas corpus.....	1	4	....	....	....	5
	Scire facias.....	....	....	....	1	3	4
	Civil cases.....	12	14	....	10	21	57
	Grand total.....	32	77	....	19	64	192
1884	Felonies.....	18	40	....	6	30	89
	Misdemeanors.....	2	9	....	....	8	20
	Habeas corpus.....	....	1	....	....	....	1
	Scire facias.....	1	2	....	....	4	7
	Civil cases.....	29	19	....	1	43	97
	Grand total.....	45	71	....	7	91	214
1885	Felonies.....	20	52	....	1	43	121
	Misdemeanors.....	7	9	....	2	18	36
	Habeas corpus.....	7	3	....	1	8	14
	Scire facias.....	1	....	....	....	1	2
	Civil cases.....	26	33	....	2	38	89
	Grand total.....	51	97	....	6	108	262

Condensed statement.

Term.	Nature of cases.	Affirmed. Written opinion.	Affirmed. Oral opinion.	Appeal dismissed. Written opinion.	Appeal dismissed. Oral opinion.	Reversed and remanded and Reversed and dismissed.	Totals.
1886	Felonies.....	20	53	....	7	43	123
	Misdemeanors	5	9	....	9	15	33
	Habeas corpus	2	2	....	1	2	7
	Scire facias .....	....	2	....	....	2	4
	Civil cases.....	17	54	1	5	34	111
	Grand total	53	119	1	23	95	290
1887	Felonies.....	20	56	2	5	51	134
	Misdemeanors	3	12	....	5	10	30
	Habeas corpus	1	3	....	....	2	6
	Scire facias	1	2	....	1	....	4
	Civil cases.....	15	52	....	7	35	109
	Grand total	40	125	2	18	98	283

Tyler Branch Summary.

Felonies, 1876 to 1887, inclusive.....	227	350	15	62	378	1032
Misdemeanors, 1876 to 1887, inclusive	87	07	7	47	204	434
Habeas corpus, 1876 to 1887, inclusive	27	15	1	4	18	60
Scire facias, 1876 to 1887, inclusive	8	11	1	27	44	91
Civil cases, 1876 to 1887, inclusive	185	369	19	71	319	913
Grand total.....	484	824	43	211	958	2520

Condensed statement.

CONDENSED STATEMENT OF CASES

Decided by the Court of Appeals of Texas, at the Galveston branch, since the organization of the Court, until the close of the term of 1887.

Term.	Nature of cases.	Affirmed. Written opinion.	Affirmed. Oral opinion.	Appeals dismissed.	Reversed and remanded and Reversed and dismissed.	Totals.
1877	Felonies	17	....	11	29	57
	Misdemeanors	8	7	9	3	26
	Habeas corpus .....	....	....	....	3	3
	Scire facias .....	....	....	....	1	1
	Civil cases	24	11	15	26	76
	Grand total	49	18	35	60	162
1878	Felonies	25	14	9	19	60
	Misdemeanors	13	11	4	13	40
	Habeas corpus	1	....	....	3	4
	Scire facias	2	....	....	5	7
	Civil cases	26	20	15	20	81
	Grand total	67	45	21	59	192
1879	Felonies	25	7	4	15	51
	Misdemeanors	4	....	5	13	23
	Habeas Corpus	1	....	....	....	1
	Scire facias .....	....	....	....	....	....
	Civil cases	5	39	8	30	82
	Grand total	35	46	17	58	156
1880	Felonies	27	63	13	56	158
	Misdemeanors	8	4	5	7	24
	Habeas corpus	1	....	....	....	1
	Scire facias .....	....	....	....	....	....
	Civil cases	13	18	7	23	55
	Grand total	48	79	25	86	238

Condensed statement.

Term.	Nature of case.	Affirmed. Written opinion.	Affirmed. Oral opinion.	Appeals dismissed.	Reversed and remanded and Reversed and dismissed.	Totals.
1881	Felonies	16	25	7	15	63
	Misdemeanors	2	2	4	4	12
	Habeas corpus .....	....	....	....	2	2
	Scire facias	1	....	1	....	2
	Civil cases	4	24	4	35	67
	Grand total	23	51	16	56	146
1882	Felonies	9	31	4	32	76
	Misdemeanors	2	10	8	10	30
	Habeas corpus .....	....	1	....	2	3
	Scire facias .....	....	....	....	1	1
	Civil cases	2	20	6	14	42
	Grand total	13	62	18	59	152
1883	Felonies	14	28	9	35	86
	Misdemeanors .....	....	6	4	8	18
	Habeas corpus .....	....	....	....	....	....
	Scire facias	5	2	4	3	14
	Civil cases	7	4	6	16	33
	Grand total	26	38	23	62	149
1884	Felonies	12	33	3	25	73
	Misdemeanors	2	8	....	9	19
	Habeas corpus	1	....	....	3	4
	Scire facias	1	....	....	4	6
	Civil cases	6	11	14	24	55
	Grand total	22	53	17	65	157
1885	Felonies	18	33	4	20	75
	Misdemeanors	2	4	3	7	16
	Habeas corpus .....	....	1	....	....	1
	Scire facias .....	....	....	....	....	....
	Civil cases	20	13	8	20	61
	Grand total	40	51	15	47	153
1886	Felonies	31	49	7	38	125
	Misdemeanors	4	6	6	3	19
	Habeas corpus .....	....	....	....	4	4
	Scire facias	1	....	....	2	3
	Civil cases	25	4	30	31	90
	Grand total	61	59	43	78	241

Condensed statement.

Term.	Nature of cases.	Affirmed.		Appeals dismissed.	Reversed and remanded and reversed and dismissed.	Totals.
		Written opinion.	Oral opinion.			
1887	Felonies.....	7	47	6	28	88
	Misdemeanors....	8	5	....	8	16
	Habeas corpus .....	....	....	....	8	8
	Scire facias.....	....	2	1	4	7
	Civil cases.....	29	51	6	40	126
	Grand total	39	105	18	83	240

Galveston Branch Summary.

Felonies, 1877 to 1887, inclusive.....	201	334	70	332	937
Misdemeanors, 1877 to 1887, inclusive..	48	68	48	88	242
Habeas corpus, 1877 to 1887, inclusive..	4	2	....	19	25
Scire facias, 1877 to 1887, inclusive....	10	4	6	20	40
Civil cases, 1877 to 1887, inclusive.....	140	246	98	289	768
Grand totals.....	403	649	217	748	2012

Condensed statement.

*Recapitulation.**

Nature of cases.	Affirmed. Written opinion.	Affirmed. Oral opinion.	Appeal dismissed. Written opinion.	Appeal dismissed. Oral opinion.	Reversed and remanded and Reversed and dismissed.	Total.
AUSTIN, 1875-1887—						
Felonies.....	286	465	9	115	457	1833
Misdemeanors.....	146	264	13	195	354	972
Habeas corpus.....	22	10	....	5	18	55
Scire facias.....	14	22	2	33	44	114
Civil cases.....	109	419	8	231	269	1036
Commission of Appeals...	73	....	5	....	87	165
TYLER, 1875-1887—						
Felonies.....	227	350	15	62	378	1083
Misdemeanors.....	87	79	7	47	204	424
Habeas corpus.....	27	15	1	4	13	60
Scire facias.....	8	11	1	27	44	91
Civil cases.....	135	369	19	71	319	913
GALVESTON, 1875-1887—						
Felonies.....	201	334	....	70	332	937
Misdemeanors.....	48	98	....	48	83	243
Habeas corpus.....	4	9	....	....	19	25
Scire facias.....	10	4	....	6	20	40
Civil cases.....	140	246	....	93	289	763
Grand totals.....	1537	2653	80	1006	2750	8026

*The report from Galveston does not show how many written opinions were delivered in cases wherein the appeals were dismissed. It shows, however, that 217 appeals were dismissed during the period covered by this report. Computed upon the ratio preserved at Tyler—to the business of which branch the volume of business at the Galveston branch most nearly approximates—about 50 of the 217 appeals were dismissed with written opinion. Nor does this statement include the large number of cases disposed of on the report of the Commissioners of Appeals at any of the Tyler and Galveston terms.

COURT OF APPEALS OF TEXAS.

TYLER TERM, 1887.

No. 2470.

WILLIAM SMITH AND LEE COKER v. THE STATE.

24	1
34	326

1. **INDECENT PUBLICATION—THE INDICTMENT**, setting out *in hæc verba* the obscene and indecent composition, charged that the appellants “did unlawfully make and publish an indecent and obscene written composition, manifestly designed to corrupt the morals of youth.” *Held*, that the indictment is sufficient; and that, the composition being set out *in hæc verba*, it was unnecessary that the indictment should allege the manner and means of the making of the same, or the circumstances attending the publication thereof. How and where the composition was made and published were matters of proof, and not pleading.
2. **CONSTRUCTION OF WRITTEN INSTRUMENTS—CHARGE OF THE COURT**.—The duty of determining whether or not a written composition is indecent and obscene devolves upon the court and not upon the jury. The composition in this case, as set out in the indictment, and as adduced in evidence, consisted of the words, “Ass hole work.” *Held*, that, in construing such composition to be obscene and indecent, and in so instructing the jury, the trial court did not err.
3. **SAME—STATUTE CONSTRUED**.—The terms “manifestly designed to corrupt the morals of youth,” as used in the statute (Penal Code, art. 348), refer to the intention obtaining in the making and publication of the composition; i. e., that the design and purpose of the party making and publishing the composition was to corrupt the morals of youth. The said terms can not be construed to mean that the composition, upon its face, and of itself, must manifestly be of a kind to corrupt the morals of youth. The charge of the trial court, conforming to this construction, was correct.
4. **INDECENT PUBLICATION—FACT CASE**.—See the statement of the case for evidence *held* sufficient to support a conviction for indecent publication.

APPEAL from the County Court of Henderson. Tried below before the Hon. W. L. Faulk, County Judge.

Statement of the case.

The conviction in this case was for indecent publication, and the penalty assessed by the jury was a fine of twenty-five dollars against each of the appellants.

Morrison Bass was the first witness for the State. He testified, in substance, that, on Sunday, August —, 1886, he attended divine service at Cox's Chapel, in Henderson, county, Texas, and occupied a seat on a bench with the defendants on trial. While the congregation was kneeling at prayer, the defendants, each having an open pocket knife in hand, employed their time in carving on the back of a bench in front. Witness saw each of them cutting on the bench, but could not, at the time, distinguish the characters cut by either of them. After church was dismissed the witness saw the words "Ass hole work" engraved on the back of the bench at the point where he saw the defendants cutting. He could not tell which of the letters or words were cut or engraved by the defendant Smith, or which by the defendant Coker. He knew, however, that the words were not engraved on the bench when the services began, and when he and the defendants took their seats on the bench immediately behind.

Taylor Martin, the next witness for the State, testified that he attended divine service at Cox's chapel on the occasion referred to by the witness Bass. After the services were over, his attention was called to the words "Ass hole work" roughly engraved on the back of one of the benches, and he helped others to erase it. He did not see the engraving made, and was unable to say that it was not on the bench before the services began on that day. Cox's chapel was used as a neighborhood school house and church.

The State closed.

The substance of the testimony of James Keebles, the single witness for the defense, was to the effect that before the conclusion of divine service at Cox's chapel, on the Sunday referred to by the witnesses for the State, he took a seat on the same bench occupied by the defendants and Marion Bass. No cutting was done on any of the benches, so far as he saw, while he was in the chapel. He saw no engraving of any kind on any of the benches either during or after service. No engraving was called to his attention at any time. Neither of the defendants had a pocket knife out while the witness was in the church.

The motion for new trial raised the questions discussed in the opinion.

Opinion of the court.

J. B. Bishop, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. It is alleged in the indictment that the defendants "did unlawfully make and publish an indecent and obscene written composition, manifestly designed to corrupt the morals of youth," and the written composition is then set forth *in hæc verba*. We think the indictment is sufficient, and that the exceptions thereto were properly overruled. It was unnecessary to allege the manner or means of making and publishing the composition, or the circumstances attending the making and publishing thereof. It was set forth in the indictment by its tenor, and it was thus made certain what composition it was that the defendants were charged with making and publishing. How and where it was made and published were matters of proof and not of pleading. (The State v. Hanson, 23 Texas, 232.)

Exceptions were taken by defendants to the charge of the court, which are earnestly insisted upon in this court. Considering the charge as a whole, we are of the opinion that it is correct and sufficient. The composition being a written one, it was the province of the court to construe it and determine whether or not it was indecent and obscene. In construing it to be indecent and obscene, and in so instructing the jury, we think there was no error. The question as to whether or not it was manifestly designed by the defendants, in making and publishing said composition, to corrupt the morals of youth, was fairly and fully submitted to the jury. We do not agree to the proposition contended for by counsel for defendants, that the words, "manifestly designed to corrupt the morals of youth," mean that the composition upon its face, and of itself, must manifestly be of a kind to produce that effect. We construe these words to refer to the *intention*—the *purpose*—of the defendants in making and publishing the composition. It must have been manifestly designed, that is, intended and purposed by them to corrupt the morals of youth, by making and publishing such composition. This was the view entertained by the trial judge, and fully explained to the jury in his charge.

We think the verdict of the jury is in accordance with the charge and the law, and is sustained by the evidence, and that there is no error in the conviction. The judgment is affirmed.

Affirmed.

Opinion delivered October 8, 1887.

Opinion of the court.

No. 2584.

J. D. ROBINSON v. THE STATE.

1. **GAMING.—INDICTMENT** charged the appellant with “unlawfully permitting a game with dice to be played and bet at in a house under his control, the said house being then and there a public place, to wit, a house for retailing spirituous liquors.” *Held*, that under article 365 of the Penal Code, as amended by the act of March 5, 1881, the indictment is sufficient.
2. **CERTIFICATE—TRANSFER OF INDICTMENTS.**—The law does not require that, upon the transfer of an indictment from the district to the county court, the certificate of the clerk, certifying the transfer, shall recite that such indictment was signed or not signed by the foreman of the grand jury which presented it.
3. **INDICTMENT—EXCEPTION.**—Article 529 of the Code of Criminal Procedure expressly provides that the want of the signature of the foreman of the grand jury is not matter of exception to an indictment and can not affect its validity.
4. **PENALTY.**—The penalty assessed by the verdict in this case was a fine of twenty dollars, but the same, by inadvertence, is recited in the judgment as twenty-five dollars. This court reforms the judgment to conform to the verdict of the jury.

APPEAL from the county court of Anderson. Tried below before the Hon. J. N. Link, County Judge.

The opinion of the court sufficiently discloses the case. The penalty assessed by the jury was a fine of twenty dollars.

Gammage & Gregg, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Appellant in this case was convicted in the county court, upon an indictment transferred from the district court, which charged him with “unlawfully permitting a game with dice to be played and bet at in a house under his control, the said house being then and there a public place, to wit, a house for retailing spirituous liquors.” The indictment is good under article 365, Penal Code, as amended by act approved March 5, 1881. (Acts Seventeenth Legislature, regular session, page 17.)

Opinion of the court.

In the county court, defendant made a motion to quash:

1. Because the indictment was not signed by the foreman of the grand jury, and because there was no sufficient evidence that the same was ever returned into the district court of Anderson county. 2. That the transcript from the district court describes an indictment signed by Charles A. Stearne, foreman, as the one returned into the district court, but it does not show that this indictment is so signed, and it does not show that this is the indictment which was returned.

This motion was overruled, and the ruling is complained of as error. The transcript shows the return of and filing of the indictment in the district court on May 2, 1887. The order of transfer is dated May 12, and the filing in the county court May 13, 1887. In the order of transfer, the number, style and nature of the case are given. The clerk certifies that the bills of indictment, a number of which were embraced, including this one, "were each signed by C. A. Stearne, foreman of the grand jury." This indictment was not so signed, and, in so far as it is concerned, evidently the clerk has made a mistake. But it is a mistake which can not affect the validity of the indictment, because, in the first place, it is not made the duty of the clerk to state, as part of his certificate of transfer, that the indictment was signed by the foreman of the grand jury, or, in fact, that it was signed at all. This is a matter with which the clerk has nothing to do. (Code Crim. Proc., art. 437.) In fact it is expressly provided by statute that the want of the signature of the foreman of the grand jury is not a matter even of exception to an indictment (Code Crim. Proc., art. 529), and does not affect its validity. (Weaver v. The State, 19 Texas Ct. App., 565.) In other respects we find the certificate of transfer amply sufficient to identify the indictment, and the motion to quash was properly overruled.

By the verdict, the fine imposed by the jury was fixed at twenty dollars, but from an inadvertence or oversight the judgment was entered up for twenty-five dollars and costs. This error can, however, be corrected in this court, by reforming and rendering the judgment for the sum of twenty dollars and costs, so as to make it conform to the verdict; and it is accordingly ordered that the judgment be so reformed.

Reformed and rendered.

Opinion delivered October 8, 1887.

Statement of the case.

No. 2457.

CHARLES DARNELL *v.* THE STATE.

1. **PRACTICE—INSANITY.**—Article 960 of the Code of Criminal Procedure of this State provides that “when, upon the trial of an issue of insanity, it is found that the defendant is sane, the judgment of conviction shall be enforced as if no such inquiry had been made.” The effect of this statute is to declare that the judgment of the trial court adjudging the defendant to be sane shall be conclusive of that issue, and that, thereupon, the judgment of conviction shall be enforced.
2. **SAME.**—Appeal to this court can be prosecuted only after the trial and conviction of the accused in the lower court for an offense and the entry of final judgment against him, which must appear in the record. A judgment rendered in an *ex parte* proceeding in the trial court, upon the issue of insanity of the accused, after his trial and conviction of an offense, is not such a judgment as will support an appeal to this court.
3. **SAME—CASE STATED.**—In 1883 the appellant in this case was tried and convicted in the district court of Wood county for murder of the first degree. On his appeal to this court the judgment of conviction rendered below was affirmed. Subsequent to this affirmance, and before sentence was pronounced, information was filed in the district court setting forth that the accused had become insane. The trial of this issue resulted in a judgment of insanity against the appellant and he was confined in the State Lunatic Asylum. In the process of time he was discharged from said asylum as sane, and was delivered to the sheriff of Wood county. Thereupon a statutory affidavit, alleging that the appellant had become sane was filed in the district court, and, upon the hearing of the issue, thus presented, the jury found, and the court adjudged, the appellant to be sane. From this judgment this appeal is prosecuted. *Held*, that this is not a final judgment of conviction for an offense, such as is contemplated by law, and can confer no jurisdiction upon this court. Therefore the motion of the Assistant Attorney General to dismiss the appeal must prevail.

APPEAL from the District Court of Wood. Tried below before the Hon. F. J. McCord.

The opinion discloses the nature of the case. The original trial upon the merits of the case will be found reported in the fifteenth volume of the reports, beginning on page 70.

No brief for the appellant has reached the Reporters.

W. L. Davidson, Assistant Attorney General, for the State.

Opinion of the court.

WILLSON, JUDGE. In 1883, Charles Darnell, the appellant herein, was indicted in the district court of Wood county for the murder of William Gilbraith. In the same year he was tried in said court upon said charge, and was found guilty of murder in the first degree, and the death penalty was assessed against him. He appealed from said conviction to this court, and on the fourteenth day of November, 1883, this court affirmed said judgment of conviction. (*Darnell v. The State*, 15 Texas Ct. App., 70.) After said affirmance, and before sentence, information was made to the district court of Wood county that the defendant had become insane. A trial was had in said court upon said issue, and he was found and adjudged to be insane, and was confined in the lunatic asylum, from which, after the lapse of some six or seven months, he was discharged as sane from said asylum and delivered again into the custody of the sheriff of Wood county. At the November term, 1886, of the district court of Wood county, said court was informed, by the affidavit in writing of a credible person, that said Darnell had become sane. Said court thereupon caused a jury to be impaneled to try said issue, and said jury returned a verdict that said Charles Darnell was sane, whereupon said court adjudged him to be sane. From which last verdict and judgment this appeal is prosecuted, and the Assistant Attorney General moves to dismiss said appeal, upon the ground that this court has no jurisdiction to entertain the same.

It appears from the record before us that the proceedings had in the trial court with reference to the sanity of the defendant have all been regular and conducted in strict accordance with the provisions of the statute. (Code Crim. Proc., title 12, chap. 1.) He has been found to be sane by the verdict of a jury, and has been so adjudged by the trial court. It is provided by statute that "when, upon the trial of an issue of insanity, it is found that the defendant is sane, the judgment of conviction shall be enforced as if no such inquiry had been made." (Code Crim. Proc., art. 960.) It is no where provided by statute, either expressly or impliedly, that the defendant shall have the right to appeal from a judgment rendered in such proceeding. It is clear to our minds that it is the intention of the statute that the judgment of the trial court, adjudging the defendant to be sane, shall be conclusive of that issue, and thereupon the judgment of conviction must be enforced.

 Syllabus.

The right of appeal is given a defendant in any criminal action *upon conviction*. (Code Crim. Proc., art. 837.) This evidently means that the right exists only where the defendant has been found and adjudged to be guilty of an offense. It has been repeatedly and uniformly held in this State that an appeal can only be prosecuted from a final judgment of conviction rendered and entered against the defendant. The conviction is an indispensable requisite to the right of appeal, and the record, on appeal to this court, must show such final judgment of conviction, or this court can not entertain jurisdiction of the case. There is no conviction until judgment has been rendered and entered adjudging the defendant to be guilty of an offense. (*Mirelles v. The State*, 13 Texas Ct. App., 346; *Anschicks v. The State*, 43 Texas, 587; *Young v. The State*, 1 Texas Ct. App., 64; *Smith v. The State*, Id., 408; same case, Id., 516; *Butler v. The State*, Id., 638; *Trimble v. The State*, 2 Texas Ct. App., 303; *Choate v. The State*, Id., 302; *Labaite v. The State*, 4 Texas Ct. App., 169; *Pennington v. The State*, 11 Texas Ct. App., 281.)

In this case the appeal is not prosecuted from a judgment of conviction. An appeal from the judgment of conviction had previously been prosecuted by the defendant to this court, and said judgment had been affirmed. He had therefore exercised and exhausted the only right of appeal in this criminal action secured to him by the statute. In this appeal this court has no judgment of conviction before it, and hence can have no jurisdiction of the appeal. We must and do therefore sustain the motion of the Assistant Attorney General. The appeal is dismissed.

Dismissed.

Opinion of the court delivered October 12, 1887.

No. 2472.

SAM MURCHISON v. THE STATE.

INTOXICATION IN A PUBLIC PLACE—TERMS DEFINED—INFORMATION—
 "PUBLIC PLACE," as that term is used in article 144a of the Penal Code, denouncing a penalty for intoxication in a public place, does not mean a place devoted solely to the uses of the public, but it means a place which,

Opinion of the court.

in point of fact, is public, as distinguished from private, a place that is visited by many persons, and that is usually accessible to the neighboring public. A grand jury room, during the session of the grand jury, is, under the above definition, *held* to be a public place; and an information so charging it is good. See the opinion in extenso on the question.

APPEAL from the District Court of Nacogdoches. Tried below before the Hon. J. I. Perkins.

The opinion sufficiently discloses the case. The penalty assessed against the appellant was a fine of ten dollars.

George F. Ingraham, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. In substance the information and complaint charge that the defendant was found in a state of intoxication in the grand jury room, the grand jury being in session in said room at the time, and that said grand jury room was then and there a public place. Exceptions to the information, and also a motion in arrest of judgment based upon the insufficiency of the information, were overruled.

It is contended by counsel for the defendant that, notwithstanding the information and complaint allege that the grand jury room was a *public place*, it also alleges a fact which shows that it was not a public place, to wit, that the grand jury *was in session therein*, which fact constituted said room a *private place*, and that therefore said information and complaint do not charge any offense. In the statute upon which said information and complaint are founded, a *public place* is not defined. (Penal Code, article 144a.) With reference to some other offenses we find a statutory definition of the term "public place." (Penal Code, article 315; acts Eighteenth Legislature, page 12.) But this statutory definition is limited to the particular offenses to which it relates, and can not be considered as determining the meaning of the term "public place" as used in the statute we are considering.

In the statute punishing gaming this same term is used without being defined expressly and fully. Under that statute it has been held that the term "public place" does not mean a place devoted solely to the uses of the public; but it means a place which in point of fact is public as distinguished from private,—

Opinion of the court.

a place that is visited by many persons, and usually accessible to the neighboring public. And it has been further held that whether or not a place is a public place, in contemplation of the statute, is a question of fact, or a mixed question of law and fact, for the determination of the jury under proper instructions from the court. (*Parker v. The State*, 26 Texas, 204; *Elsberry v. The State*, 41 Texas, 158.)

We think the definition of the term given in the decisions above cited is applicable to the term as used in the statute before us. Taking this definition for our guide we are clearly of the opinion that a grand jury room, while the grand jury is in session therein, is a public place. Such room is not only for the time being devoted solely to the public use, but it is a place that is visited by many persons, and is usually accessible to the neighboring public for the purpose of transacting the public business. Not only do the members of the grand jury, the county and district attorney and the bailiff, assemble and visit there in the discharge of their public duties, but numerous other persons visit the place as witnesses, either voluntarily or in obedience to process.

The object of this statute is to prevent intoxication at places which are within the observation of persons indiscriminately, because of the consequences resulting from evil example. It would certainly not be in furtherance of the accomplishment of this object to hold that a grand jury room, while the grand jury was in session, was not a public place, when the fact is that the young as well as the aged, the female as well as the male—all persons indiscriminately—not only visit such place voluntarily, but are compelled to go there by the process of the law. That the jurors and witnesses are required to take an oath that they will not divulge the proceedings of the grand jury, and that the deliberations of the grand jury are secret (*Code Criminal Procedure*, articles 384-393-407) can not be held to make the grand jury room a private place. It is the *proceedings* and the *deliberations* of the grand jury upon which these provisions of the statute place the seal of privacy, and not the *room* or *place* where such proceedings and deliberations take place.

We hold that the complaint and information are sufficient, and, there being no other question in the case, the judgment is affirmed.

Affirmed.

Opinion delivered October 12, 1887.

Opinion of the Court.

No. 2587.

WILLIAM BEAN, ALIAS WHITE, v. THE STATE.

THEFT—FACT CASE—POSSESSION OF STOLEN PROPERTY by the accused, however recent that possession may be, if explained and accounted for, and shown by the evidence to be lawful, will afford against the accused no legal presumption of guilt of theft. See the opinion for the substance of evidence *held* insufficient to support a conviction for the theft of a mare.

APPEAL from the District Court of McLennan. Tried below before the Hon. Eugene Williams.

The conviction in this case was for the theft of a mare, the property of William Little. The penalty assessed against the appellant was a term of five years in the penitentiary. The opinion states the substance of the evidence.

Jenkins & Jenkins and Clark, Dyer & Bolinger, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State

WILLSON, JUDGE. About September 10, 1885, William Little's mare was stolen from him in Bell county. Eleven months thereafter, to wit, about the twenty-seventh of August, 1886, she was in the possession of the defendant in McLennan county, who then and there, under the name of White, traded her to one Turner. The above recited circumstances constitute the evidence upon which this conviction is founded. There is not a particle of other criminative evidence in the record before us. On the contrary, the State, by one of her own witnesses, proved that in August, 1886, the defendant purchased said mare, and the testimony of this witness went before the jury uncontradicted by any other evidence adduced on the trial.

As presented to us, the conviction is unsupported by the evidence. Defendant's possession of the mare can not be said to be recent, and can, therefore, at most, afford but slight ground for the presumption of guilt against him. His possession, how-

Statement of the case.

ever, was explained and accounted for by the State's testimony, and shown to be a lawful one, and such being the case, although his possession might have been recent, it would not have afforded a legal presumption of guilt. (*Lehman v. The State*, 18 Texas Ct. App., 174; *Tucker v. The State*, 16 Texas Ct. App., 471; *Norwood v. The State*, 20 Texas Ct. App., 306.)

Because the judgment is unsupported by the evidence, it is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered October 19, 1887.

24	12
28	446
29	166

No. 2611.

ED TURNER v. THE STATE.

1. **BURGLARY—ENTRY.**—The entry of a room or house, if made with the free consent of the proprietor or occupant, is not a burglarious entry.
2. **BURGLARY WITH INTENT TO RAPE—FACT CASE.**—See the opinion and the statement of the case for evidence held insufficient to support a conviction for burglary with intent to commit rape.

APPEAL from the District Court of Smith. Tried below before the Hon. F. J. McCord.

The conviction in this case was for the burglary of the house of Adam and Mattie Watson, with intent to commit rape upon the person of the said Mattie Watson. The penalty assessed against the appellant was a term of eight years in the penitentiary.

Mattie Watson was the first witness for the State. She testified, in substance, that she was the wife of Adam Watson, and lived with him in his house, in Smith county, Texas, in July, 1887. There were three doors to the room occupied by the witness and her husband, two of which opened to the outside world. The third door was in the partition which separated that room from the room occupied by Henry Lacey, the defendant's brother-in-law. One of the outside doors fastened on the inside and could not be opened from without. The other fastened with a

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latch which could be sprung from the outside and the door be opened. The door leading into Lacey's room was secured by a string attached to a nail in Lacey's room, and could be opened from that room.

At about dusk on the evening of July 27, 1887, the witness's husband left home to go to the field and pull fodder, it being his practice, on account of the hot weather, to work at night and sleep during the day. Upon the departure of her husband the witness, without undressing, and leaving the door open and the lamp burning, lay down across the bed in her room and was soon asleep. Within a short time witness was awakened by Will Richardson, who en route to the field to pull fodder, called to witness asking for her husband. Witness told Richardson that her husband had already gone to the fodder field. Richardson then advised witness to extinguish the lamp as a precaution against fire, and left, going toward the field. Thereupon the witness got up, blew out the lamp, closed the doors, returned to bed without undressing, and was soon asleep. About eleven o'clock she was awakened by some one pressing on her stomach. Getting up, she went to the door, and then to the fire place, where she stirred the fire. She saw no one in her room nor could she hear any one moving about in the house. She then called her husband by name. Receiving no reply, she called Henry Lacey. Lacey failing to reply, she called to the defendant and asked him what he had been doing in her room. He replied that he had not been in the witness's room. Witness told him that he was a liar. He replied that the witness was a d—d liar, and the witness retorted that he was another. During the progress of this quarrel the witness summoned her husband from the field by blowing a horn. He arrived about twenty minutes later, accompanied or followed shortly by Henry Lacey and Will Richardson. After the arrival of her husband the defendant asked witness to drop the matter, adding that if she would do so he would continue to treat her with the respect he had previously observed toward her. Witness's room was entered on this occasion without her knowledge, permission or consent. Defendant frequently stayed with his brother-in-law, Lacey, but at the time of this offense he had been absent about two days. Witness and her husband had always lived together peaceably.

Adam Watson, the husband of the first witness, testified, for the State, that he went to work in his fodder field about dusk on the evening of July 27, 1887. He was soon joined in the field by Will

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Richardson. Between twelve and one o'clock the witness heard the blowing of the horn at his house and went rapidly home. Upon his arrival he found the defendant sitting on the side of the bed in Henry Lacey's room, his shoes off and lying on the floor. The witness's wife was standing in the door between the two rooms, quarreling with the defendant. Witness asked what was the matter. His wife replied that the defendant entered her room unbidden and got on top of her. Defendant remarked that the witness's wife was a d—d liar. A quarrel between the parties present ensued, and witness told defendant to leave the place and never return to it. About that time the parties, being then in the yard, were joined by Henry Lacey and Will Richardson. Witness left the parties named and went to McFarland's to get an officer to arrest the defendant. He failed to procure an officer, and on his return found that defendant had left the house. Defendant was arrested in the field on the following morning. The witness had never had occasion to question his wife's fidelity to him.

Henry Lacey, the defendant's brother-in-law, testified, for the State, that he lived in a house on McFarland's farm, and occupied a room adjoining that of Adam Watson and his wife Mattie. Defendant worked for McFarland, and, in July, 1887, roomed with the witness. Witness reached his room on the evening of July 27, 1887, a little after dark, and after Adam Watson and Richardson had gone to the fodder field. Passing to the shed room to get supper, the witness observed that both of the outside doors of Watson's room were open. There was a light in the room, and Mattie Watson was lying across the bed. He did not observe the door leading from the Watsons' into his room. After supper witness went to his work in the fodder field. At about twelve o'clock he heard the blowing of the horn and went back to the house. On his arrival he found defendant, Mattie, Adam and Richardson in the yard, quarreling. Witness asked defendant what was the matter. He replied: "Mattie is mad with me, and is trying to get me into trouble; she is telling a lie on me." The witness then tried to make peace between the parties, and asked defendant if the charge against him was true. He replied: "If Mattie says it's so I guess it must be so." Adam soon left the place in quest of an officer. Defendant then proposed to stay all night with witness, as had been his custom, but witness would not permit him, and he left. The witness had often observed Mattie and defendant talking and laughing with

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each other. There was, however, a slight coolness between them because of defendant's report to Liza Wooten of a statement made to him by Mattie concerning the relations of the witness and the said Liza, who were then sweethearts.

Will Richardson testified, for the State, that he went by Watson's house early on the night of the alleged offense, and called for Adam Watson to go to the fodder field. He found the outside doors of Watson's room open, a lamp burning on the mantelpiece and Mattie Watson lying across the bed. When he asked for Adam, Mattie raised her head and said that he had gone to the field. Witness then advised Mattie to extinguish the lamp, and left, going to the field, where he joined Adam. Mattie did not get up from the bed while witness was at the house. About twelve o'clock the horn sounded, and Adam left the field for the house. Witness followed, and when he reached the house he found Mattie, defendant and Adam in the yard, quarreling. He asked the cause of the row, when defendant said that Mattie was mad with him and was trying to get him into trouble. Witness made an effort to restore peace, and, failing, went home. He could not say whether or not the lamp was still burning and the doors of Watson's room open when he got back to the house from the field.

The State closed.

Liza Wooten testified, for the defense, that, at the time of the alleged offense, Mattie Watson was angry with defendant, because he reported to witness a statement made about her and Henry Lacey by the said Mattie. A day or two before the alleged offense Mattie told witness that she intended to get even with defendant, and that upon their next meeting she intended to whip him or be whipped by him.

The motion for new trial raised the questions discussed in the opinion.

C. D. Morris and R. L. Robertson, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. As presented to us in the record, the evidence does not support the conviction. Defendant had been in the habit, prior to the alleged burglary, of sleeping in one room of the house with his brother-in-law, who occupied said room,

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who had authority to, and did permit him to enter said room and sleep therein on several occasions prior to the alleged burglary. In fact, at the time of the alleged burglary, the defendant was living with his said brother-in-law at said house, they occupying one room of said house, while Adam Watson and wife occupied another room in said house. An entry into the room occupied by defendant's brother-in-law, if made with the free consent of said brother-in-law, would not be a burglarious entry, and the evidence tends strongly to show that the defendant had such consent of his brother-in-law to enter said room. (Penal Code, article 706.) As to said room, then, the evidence certainly does not establish a burglary.

As to the room occupied by Watson and his wife, there is no positive testimony that the defendant entered it. He was not seen in that room, and all the evidence tending to prove his presence in said room is found in the testimony of Watson's wife, who testified that she was on her bed asleep, and was awakened by some one pressing on her stomach. She saw no one in the room, nor did she hear any one moving about in the room. She went to the fire place and stirred up the fire, and, finding that the defendant was in the adjoining room, she accused him of having come into her room, which accusation he stoutly denied.

But, conceding that the evidence sufficiently proves that the defendant entered Watson's room, does it sufficiently prove that his intent in doing so was to commit the crime of rape upon Watson's wife, as alleged in the indictment? Admit that he was in the room, and that he pressed upon the stomach of the woman while she was asleep, we do not think, considering the other facts in this case, that his acts show an intent to ravish the woman. He did not get in the bed with her; did not attempt to pull up her clothes; did not use or attempt to use any force upon her except to press upon her stomach, and how heavily, how long, and in what manner he pressed upon her stomach we are not informed by the evidence. He did not attempt to use any stratagem to induce the woman to believe that he was her husband. He did nothing whatever but "press upon her stomach," and the evidence that he did that is circumstantial, and not above the suspicion of being fabricated, or at least, the product of a distorted imagination. We can not give our approval to a conviction founded upon such testimony as this record presents. It is altogether too uncertain, indefinite and equivocal to justify

Syllabus.

a court in depriving a citizen of his liberty, and fixing upon him the stigma of a felon.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

Opinion delivered October 19, 1887.

No. 2600.

I. N. WILLIAMS v. THE STATE.

1. **JAIL BREAKING TO RESCUE PRISONERS**—INDICTMENT conforming to No. 138 of Willson's Criminal Forms is sufficient to charge the offense of breaking into a jail to rescue a prisoner, as that offense is defined by article 212 of the Penal Code.
2. **PRACTICE—CHARGE OF THE COURT.**—It is only when the error in the charge of the court is fundamental, or when, in view of all the facts in the case it was calculated to injure the rights of the defendant, that the charge, in the absence of a proper bill of exceptions or of a requested instruction, will be revised.
3. **SAME.**—The objection urged to the charge in this case was that it is fundamentally defective, in that it did not explain to the jury the meaning of the word "break" as used in the statute defining the offense of breaking into a jail to rescue a prisoner—the defense contending that the definition of that term as it is used in the statute defining burglary is insufficient as applied to the offense of jail breaking; and further, that the term as used in the latter statute, not being specifically defined, it must be construed in the sense in which it is ordinarily understood in common language. *Held*, that, the evidence showing that the appellant entered the lower room of the jail by unbolting an unlocked door, and that he then forced the jailer, at the point of a pistol, to unlock the prison cages, was sufficient to prove such a breaking as is contemplated by the statute. See the opinion in extenso on the question.
4. **SAME—EVIDENCE.**—See the opinion for evidence *held* to have been properly admitted under the rule that, a conspiracy having been established, the acts and declarations of one conspirator pending the conspiracy, and in furtherance of the criminal design, are admissible against all of the conspirators, and note the statement of the case for evidence *held* sufficient to support a conviction for breaking into a jail to rescue a prisoner.

APPEAL from the District Court of Comanche. Tried below before the Hon. T. H. Conner.

24	17
23	198
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32	80
24	17
38	238

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The indictment in this case, based upon article 212 of the Penal Code, charged the appellant with breaking into the jail of Comanche county, Texas, on the twenty-eighth day of March, 1886, for the purpose of rescuing one Henry Williams, a prisoner confined in the said jail. The trial resulted in the conviction of the appellant, and the penalty assessed against him was a term of four years in the penitentiary.

The State first introduced in evidence an indictment preferred against Henry F. Williams by the grand jury of Comanche county, charging him with the theft of a horse from E. B. Henderson, in December, 1885, the capias issued thereon and the sheriff's return of the same, dated February 6, 1886, showing the arrest of the said Henry F. Williams and his confinement in the Comanche county jail. The next evidence introduced by the State was the record of the trial of the said Henry F. Williams upon the said indictment at the February term, 1887, of the Comanche county district court, which showed his conviction under a verdict assessing his punishment at a term of fifteen years in the penitentiary. The State also read in evidence from the said record the judgment of the court based upon the said verdict.

R. A. Slack was the first witness for the State. He testified that on the twenty-eighth day of March, 1886, he was deputy sheriff and jailor of Comanche county, Texas, serving under the sheriff, James Cunningham. At the time mentioned the jail contained but three prisoners, viz: Henry Williams, recently convicted for horse theft and under a sentence of fifteen years in the penitentiary therefor; James Henry Hill, who had been recently convicted for horse theft and awarded a term of five years in the penitentiary, and Charley Atkinson, who had been convicted of cattle theft and awarded a term of ——— years in the penitentiary. The convictions in the Hill and Atkinson cases had, however, been set aside and new trials granted them. The Comanche county jail was a two story building. The witness and his family occupied the lower story as a residence. The cages in which the prisoners were kept were up stairs. A hallway traversed the lower story, and a corresponding one ran across the building in the upper story. The stairway stood about halfway in the hall. A wooden door divided the stairway about halfway up. Two heavy iron doors standing opposite each other, one of solid iron and one of iron grating, opened from the upper hall into the cages. An iron door led from the cages to

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an outer apartment, or run around. An iron door then led from the run around into the cells proper. All of the said prisoners were, on the night of March 28, 1886, confined in the cells proper, and all of the doors leading thence into the upper hall were securely bolted and locked, and the witness had the keys. The door on the stairway and the doors leading from the lower hall into the outer world were all closed and bolted but were not locked. After eating his supper on the said night, the witness placed a light in his family room, near the door leading into the lower hall, closed and bolted the outside doors, and sat down outside of the jail. He remained there a short time and went over to the Presbyterian church, where a protracted meeting was in progress. The witness's family were not at the jail on that night. The witness remained at the protracted meeting an hour and a half or two hours, returning to the jail between nine and ten o'clock p. m. He found the door leading into the jail house, down stairs, closed and bolted; just as he left it. Witness entered, and just as he closed the said door, several parties, who had entered the lower apartments during his absence, covered him with guns and ordered him to go up stairs with them and open up the cells. Witness asked the parties what they meant. In reply they merely repeated the order for witness to go up stairs and open the cell doors, and witness obeyed them. Having opened all of the doors but that to the inner cell, the witness, for the purpose of getting a view of the faces of the men, complained that he could not see the key hole, and requested one of them to strike a match. One of them did so, but when the witness undertook to turn his head towards the parties, one of the men placed a pistol to his face and said: "You just keep your eyes on that lock." Witness then opened the door. When all the doors were thrown open, one of the men said to the prisoners: "Come out of there quick, fellows. Let's get away from here." The prisoners named came out of the cells, and all parties, rescued, rescuers and witness, left the jail. When the street was reached, Henry Williams seized one of witness's arms and one of the rescuers seized the other, and, preceded by some of the party and followed by others, they started with him towards the graveyard. When the thicket near the graveyard was reached, the party stopped. The prisoners and two of the rescuers remained in the thicket with witness, and the other rescuers went after their horses, which they appear to have secreted some where near. These parties soon returned with

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horses. They then told Hill and Atkinson to take care of themselves, and they left, traveling on foot. The night was extremely dark and it was drizzling briskly. It was therefore utterly impossible for the witness to distinguish any one of the rescuing party. But when, in obedience to direction, Henry Williams mounted one of the horses, behind one of the men, the witness went up to him to shake hands, in order to get a look at the horse. While shaking hands with Henry he observed that the horse the latter had mounted was a roan in color. It was too dark for the witness to distinguish the brand or flesh marks of the horse. The witness saw that one of the other horses was a white or gray in color and the others were all dark animals.

Henry Williams and the witness having shaken hands and bid each other good bye, the rescuers and the said Henry Williams rode off in an easterly direction. They carried with them the witness's pistol, which they took from him when they first confronted him in the lower hall of the jail, and the witness has not seen it since. Five men composed the rescuing party. As soon as he was released the witness made his way back to the jail, hunted up Sheriff Cunningham and gave the alarm. Two pursuing parties were organized, the witness going with that headed by Sheriff Cunningham. The second party was composed of Burrell Taylor, Dudley Sherrill and Turner Breedlove. The witness's party did not strike the trail at all. On their way to the thicket, after securing the release of the prisoners, the rescuing party, with the witness in their charge, passed the church. Services had just closed, and witness saw a great many persons passing out of the church. The prisoner Hill was subsequently recaptured, retried and convicted, and is now in the penitentiary. Atkinson is still at large. The jail was not entered by the rescuers with the consent or connivance of the witness. He opened the jail doors for them, at the point of their pistols, because he was afraid not to do so.

J. D. Sherrell was the next witness for the State. He testified, in substance, that he lived in the town of Comanche, Comanche county, Texas, on the night of March 28, 1886, when the Comanche county jail was forced, and Henry Williams and other prisoners were released. The witness, Burrell Taylor and Turner Breedlove, as a sheriff's posse, left Comanche at about eleven o'clock on that night in pursuit of the rescuing party. Proceeding upon information obtained in answer to inquiries, the witness's posse traveled over the road running west from Comanche

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and known as the Comanche and Callahan or Belle Plain road. They struck the trail of a two horse buggy and three horsemen and followed it that night until they reached the house of the widow Garrett, about fifteen miles from Comanche. They remained at Mrs. Garrett's until morning, when they resumed the pursuit, following the plain trail of the buggy and horsemen. The trail pointing to May's store, the party took the road leading to May's store from the road they had been traveling, expecting to overtake the rescuers at said store or to obtain definite information. Failing to hear of the parties at May's store, they returned to the Comanche and Callahan road, across country, and struck it near Suddeth's residence, about two miles from where they left it to go to May's store. Here they again found the trail. At that point the Cisco and Brownwood road intersected the Callahan and Comanche road, and followed it for a short distance. The trail of the buggy from Suddeth's on was plainer than it was from Suddeth's to Garrett's. A rain had fallen during the early part of the previous night and water was still standing in the ruts between Garrett's and Suddeth's made by the buggy wheels. There being no water in the ruts beyond Suddeth's, it was evident that the buggy had passed over that part of the road subsequent to the rain. The posse encountered no difficulty in following the trail until they reached the point where the buggy and the horsemen finally separated. The buggy, in the main, traveled the main road, but occasionally left it, traveling through gullies, broken country and steep banks or hills. At the point of final separation, the buggy turned from the road to the left at or near the house of a man named Ford. The trail of the horsemen followed Ford's fence, and at another place went over rough country from the road, by the place of a man named Spence, whence it followed a dim path back to the main road, two miles further on, near Coffelt's place. The buggy track, leaving the main road, went to the Old Fort ranch, about thirty-five miles distant from Comanche. At the Old Fort ranch the witness's posse found George Dennis and John Williams, two of the parties charged in separate indictments with complicity in this offense. At the same place they found the buggy and the two horses. The buggy was standing near the ranch building. The two horses were found in an old outhouse near by. The harness was piled on the gallery of the ranch house.

When the witness and the members of his posse entered the

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On the house they found Dennis and John Williams sitting over a smouldering fire. They were immediately arrested. Among their effects some blankets and two pistols, one a white and the other a brown handled weapon, were found. No one was then living at the Old Fort ranch. Dennis and John Williams said that they had just eaten their dinner. The Old Fort ranch was in full view of the public road, and could be seen for at least a quarter of a mile. Having arrested Dennis and John Williams, the witness and his party hitched up the buggy, an old no top vehicle, and started back with their prisoners. One of the horses found in the possession of Dennis and John Williams was a blue roan and the other a sorrel animal. The witness had since seen the buggy and horses in Huse's wagon yard, in the town of Comanche. Witness did not examine the brands on the horses. The prisoners were taken to Coffelt's house, where a party was secured to aid Mr. Breedlove in taking them to the Comanche jail, and then witness and Taylor resumed their pursuit of the horsemen.

Witness and Taylor soon struck the trail, which led off towards Bird's store and the bayou. From the point where they struck the trail they followed it to an old unoccupied house in the valley, some distance off the main road. At the old house the trail turned back in a northerly direction, traveling sometimes over the main road and sometimes over the rough country. At one place, about a mile and a half from the main road, the witness found where the horsemen had stopped to eat a meal. From that point the trail was followed to the Pecan bayou, which it crossed and recrossed several times. It left the bayou below Crosscut and traveled up a ravine or canyon. This route was remote from any road or traveled course, and was over an exceedingly broken and rough country. Over this course the trail was followed to and through the gate at Watley's place, whence it led off in a northerly direction, following no road. It went into the pasture of Charles McDermott, but not through a gate. The pasture was entered by two of the fence posts being uprooted and the wires bent down. It was now near dark, and the witness and Taylor went to Dunlap's house, near by, and remained over night. On the next morning they went into McDermott's pasture, in the manner that the three horsemen had entered it, took the trail and resumed the pursuit. They went directly to McDermott's house, which was in the pasture, and ascertained that the men they were following passed the pre-

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vious night at that house. At McDermott's house they found McDermott, E. O. Woods and two or three others. Woods and two other parties then joined witness and Taylor and the pursuit was resumed. The horsemen went out of the pasture as they entered it, and went off in a northwesterly direction. From this point the trail led over a hard, solid turf, and was followed slowly and with great difficulty for about twelve miles, when the pursuit was abandoned.

Burrell Taylor testified, for the State, substantially as did the witness Sherrill.

Turner Breedlove testified, for the State, substantially as did Sherrill and Taylor, up to the point at which he left them at Coffelt's, to take the prisoners Dennis and John Williams to Comanche. From this point he testified, in substance, that, leaving Coffelt's, he took Dennis and John Williams to May's store, where he hired parties to guard them over night, while he slept. On the next morning he took the prisoners to Comanche and turned them over to the sheriff. He then placed the buggy and horses in Huse's wagon yard, where they remained until after the examining trial of the prisoners. The blue roan horse was branded XHX on the left hip. If he was otherwise branded the witness did not observe it. Witness saw but could not remember the brand on the sorrel horse.

S. N. Acton testified, for the State, that he lived in Comanche county, about four miles from the town of Comanche. The witness was out hunting his mules, at about an hour and a half by sun, on the evening of March 28, 1886, on the night of which day the jail delivery in Comanche occurred. While engaged in hunting his mules he came upon an old man and two young men, camped about five hundred yards from the road. The old man said that he and his party were from Bosque county, and were hunting a tract of eight hundred or nine hundred acres of land suitable for a stock ranch. The witness mentioned a tract of land he thought desirable for a stock ranch, and told the old man from whom he could purchase. In the defendant on trial the witness recognizes the old man described. The two young men with him the witness recognizes as George Dennis and John Williams, charged as parties to this offense and now in court. The witness was directly interested in the settlement of the country, and made it a point to observe closely all persons coming into the county, especially if they spoke of settling, and was certain that the defendant and Dennis and John Wil-

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liams were the three men he saw in the camp as stated. They had an old no top, two horse buggy with them, out of the box of which two horses, one being a blue roan, were eating. He was not certain now, but it was his recollection that he saw several other horses about the camp. Witness observed the roan horse particularly, because he then thought that he had previously seen him both in Johnson and Dallas counties. After the arrest of these parties the witness went to the jail and identified defendant, Dennis and John Williams as the men he saw in the camp; and at Huse's wagon yard he pointed out the roan horse he saw in their possession. Witness saw more than one well rigged saddle in the camp, and as many if not more than four horses in and about the camp.

J. M. Zachery testified, for the State, that he lived on the Comanche and Callahan road, about three miles distant from Comanche. Five men, strangers to the witness, one riding a blue roan, another a gray or white and the others dark horses, passed the witness's house on Sunday, March 23, 1886, traveling slowly towards the town of Comanche. None of them passed nearer than one hundred and fifty yards of the witness, and he could identify none of them. One of them, as he sat in the saddle, was a head and shoulders taller than the others.

S. F. Hilley testified, for the State, that he lived about ten miles from the town of Comanche, on the Comanche and Callahan road. On the night of Saturday, March 27, 1886, the night before the jail delivery, five men passed witness's house, traveling leisurely towards Comanche. Two of the men first passed on horseback. They stopped at the gate and asked the way to De Leon. About an hour later an elderly man, riding in a two horse, no top buggy, and two men on horseback came along. One of these last horsemen was riding a blue roan horse. This party stopped at the gate and asked if they could procure feed for their horses. Witness's son James was then at the wood pile.

James Hilley testified, for the State, substantially as did his father, and in addition that he observed the roan horse closely, because the brand, XHX, resembled the brand of his uncle, which was XXL. On the next night the sheriff's posse came by the house and reported the jail delivery.

C. L. Gatcher testified, for the State, that about two or three hours by sun, on Monday, March 29, 1886, three men, two riding sorrel horses, stopped at his house, about thirty miles west from

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Comanche, on the Comanche and Callahan road, and stayed about a half an hour to warm. The old man of the party said that he and his companions were land hunters from Bosque county; that they stopped over the preceding night a few miles back, and found it hard weather for land hunters. About three-quarters of an hour after the men left, Taylor, Sherrell and Breedlove arrived at witness's house, reported the jail delivery of the night before, and went on in pursuit of the men. The preceding night was a very cold one, a heavy rain and sleet having fallen.

L. H. Coffelt testified, for the State, that he lived about four miles from Gatcher, and on the same road. On Friday or Saturday preceding the jail breaking, an old man in a no top two horse buggy, and two men on horseback, passed witness's house going toward Comanche. They asked the distances to Clio, Seip Springs and Comanche.

J. H. Mattison testified, for the State, that he lived near the house of the witness Coffelt. About two hours after sunrise on Monday, March 29, 1886, two men riding in a no top two horse buggy came to his house and stopped to warm, the weather being very cold. They said they had come from near Clio, some ten or twelve miles south from witness's house and seven or eight miles south from May's store. They said that they lived in Taylor county. Soon after they left, officers Taylor, Sherrell and Breedlove passed, and in the course of the day returned, having the same two men and the two horse no top buggy in charge. The two men were George Dennis and John Williams, now in court and charged as parties to the jail delivery in Comanche. The Old Fort ranch, where they were said to have been arrested, was about four miles from witness's house. Mrs. J. H. Mattison corroborated the testimony of her husband.

H. Hollibee testified, for the State, that he lived in Brown county, about two and a half miles from the residence of the witness Mattison. Witness was at May's store, in Comanche county, on Saturday, the day before the jail delivery. On the road he saw five men going toward Comanche. Three, and it may be four, of the men were on horseback. An old man, and, witness thought, another man, were traveling in a no top two horse buggy. Another horse was being led or driven. They asked the distance to Comanche, and traveled on. Witness had known the defendant in this case for many years, first knowing him in Bosque county, when he was county treasurer. If de-

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fendant was the old man he met in the buggy, witness did not recognize him.

W. S. Ford testified, for the State, that he lived on the Comanche and Callahan road, about twenty-five miles from Comanche. Between daylight and sun up, on Monday, March 29, 1886, three men riding horseback, one of the horses being gray, and two men in a no top two horse buggy, passed witness's house going west. The buggy did not go immediately by, but circled around witness's house, through the woods. Later on that day three officers passed witness's house in pursuit of parties who had delivered three prisoners from the Comanche county jail. In the evening the officers came back, having in charge the two men who passed the witness's house in the buggy.

E. O. Woods testified, for the State, that he spent the night of Monday, March 29, 1886, at McDermott's ranch, about fifty miles from Comanche. About sundown on that day three men, one riding a gray, one a sorrel, and the other a dark brown horse, came to McDermott's house and asked to stay over night. Two of their horses were in the "buckle brand." They gave no names nor did they say where they were going, but said they came from Brown county. Their horses appeared to have been ridden hard. The defendant on trial was the old man of the three who came to and stayed at McDermott's house on that night. The three men did not leave McDermott's house until rather late on Tuesday morning, and soon after they left, Taylor, Sherrell and another man, a Mr. Dunlap, arrived, asking for three men whom they had trailed to the house.

Sheriff Cunningham testified, for the State, that he saw the man, George Dennis, who was under indictment for this offense, in the town of Comanche, about three o'clock on Sunday evening, on the night of which day the jail breaking occurred. Dennis was walking about the jail and appeared to be examining it, and his actions were so strange that witness came near arresting him on suspicion. At a later hour witness saw him in company with another man at the livery stable where their horses were being fed. Witness had not since seen the other man. The jail was entered by some parties on that Sunday night without the knowledge or consent of the witness.

Fred. A. Beall, deputy sheriff of Nolan county, testified, for the State, that he arrested the defendant in Nolan county, Texas, upon process from Comanche county, the charge being that involved in this prosecution. The arrest was made near old man

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Dennis's house, which the witness had watched for some time. When arrested, the defendant was sitting in a thicket of shinery bushes, with a Winchester rifle across his lap. Witness arrested defendant by covering him with his gun. Henry Williams, who was released from the Comanche county jail, was a son of the defendant. John Williams, under indictment as one of the rescuers, was a nephew of the defendant, and George Dennis was the defendant's son-in-law. Defendant and Dennis lived in Nolan county in March, 1886, and John Williams then lived in Callahan county.

Steve Shelley testified, for the State, that in March, 1886, he lived in Callahan county, about one and a half miles distant from John Williams's house. He knew that John Williams left home late in March, 1886, and was gone some time.

Mat. Shelley and his wife testified, for the State, that they knew that John Williams and his uncle, this defendant, were at John Williams's house, in Nolan county, on Tuesday, the twenty-third day of March, 1886. They were not there on the following Saturday, but the wife of this defendant was there. Mat. Shelley stated also that he knew that John Williams owned, in March, 1886, a blue roan horse, branded XHX on the hip, and a sorrel horse whose brand he did not remember.

R. Y. Scott testified, for the State, that in March, 1886, John Williams owned a blue roan horse branded XHX on the left hip and JW on the left shoulder. He also owned a sorrel horse, but witness did not remember his brand.

J. C. Montgomery, a son-in-law of the defendant, was the next witness for the State. He testified that in March, 1886, the defendant owned a number of horses in what was known as the "buckle brand."

The State closed.

Turner Breedlove, recalled by the defense, testified that he was one of the Sherrell party which left Comanche about eleven o'clock at night, on Sunday, in pursuit of the jail breakers. The first the witness saw of a trail of a buggy or horseman was at the house of the widow Garrett, fifteen miles from Comanche. The trail at that point was not as fresh as it was at Suddeth's, one and a half miles from May's store.

J. C. Montgomery testified, for the defense, that he was at home in Nolan county on the twenty-eighth day of March, 1886, and on the following Monday, the twenty-ninth, and Tuesday, the thirtieth. It was his best recollection that he saw the de-

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defendant at his home in Nolan county on Tuesday, but he would not be certain that it was not Wednesday. The distance from defendant's house in Nolan county to John Williams's house in Callahan county was fifty-six miles. Witness remembered the arrest of defendant by Deputy Sheriff Beall. He had been previously arrested by Sheriff Bardwell, but made his escape. Witness made a bond for George Dennis, in Nolan county, and sent it to the sheriff of Comanche county, who refused to accept it, although it was a first class bond. Witness did not tell defendant about the sheriff of Comanche refusing Dennis's bond until after the defendant made his escape from Bardwell. Witness saw the defendant in Nolan county previous to the jail breaking in Comanche. He said nothing to witness indicating his intention to break the jail. Witness knew that the defendant had received several letters from his son Henry, then in the Comanche jail, begging for help. Witness came to this trial from DeLeon with the district attorney, and remembered saying to that officer that it might have been Wednesday that he saw defendant in Nolan county, but that he thought it was Tuesday. Witness, who, in 1886, was worth eight thousand dollars, signed Dennis's bond. Tom Dennis, another signer, had about two hundred head of cattle. Everest, another signer, had about two hundred head of cattle and ten horses. Hugh Dennis, another signer, had about 400 head of cattle, some school land and about 45 head of horses.

Sheriff Cunningham testified, for the defense, that the Dennis bond, signed, as stated by the witness Montgomery, was refused by him, witness, although the sheriff of Nolan county wrote him that he thought the bond was good, and if returnable to his county would be accepted by him. Sweetwater, in Nolan county, was about one hundred miles from Comanche.

B. D. Shropshire testified, for the defense, that he represented Henry Williams as attorney on his trial for horse theft, and was under engagement to represent him on appeal. On Saturday, the day before the jail delivery, the witness received a letter from the defendant, postmarked at Sweetwater on Thursday or Friday. Witness knew that letter to be in defendant's handwriting, but could not say that the defendant personally placed it in the postoffice in Sweetwater.

The motion for a new trial raised the questions discussed in the opinion.

Opinion of the court.

Shropshire, Thurman & Jenkins, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Appellant has been tried and stands convicted under article 212 of the Penal Code, which provides that, "if any person shall break into any jail for the purpose of effecting the rescue or escape of a prisoner therein confined, or for the purpose of aiding in the escape of any prisoner so confined, he shall be punished by imprisonment in the penitentiary for a term not less than two nor more than six years."

The indictment upon which he was tried is in proper form and is sufficient. (Willson's Criminal Forms, No. 138, p. 77.) Appellant asked no special instructions in addition to the charge of the court as given to the jury, but saved a general exception to the charge given, to wit, "that it did not charge the law in the cause." No special defect is pointed out, but it is insisted in the brief of counsel that the charge is radically defective, notwithstanding it contained the statutory declaration of the crime in terms used above, because it omitted to explain to the jury the meaning and character of the word "break," as used in the statute. It is insisted that the definition of the word "breaking," in burglary, to wit, that the slightest force is sufficient, as by the lifting of a latch, etc. (Penal Code, art. 708), does not and can not be made to apply to this character of case, since no legal definition of the word "break" as here used is given, as is done in burglary, and that in such conditions the rule is that all words not specially defined are to be taken and construed in the sense in which they are understood in common language. (Penal Code, art. 10.) We think the unbolting of the door of the house by the parties in the first instance was sufficient, in contemplation of this statute, to constitute a breaking under the circumstances of the case.

If it be conceded, however, that the failure to define the meaning of the word "break" is erroneous, there being no special exception saved to it on the ground of such omission, and no proper instruction upon the subject requested by defendant and refused by the court, the exercise of the authority to revise the charge and reverse the case for such error depends upon the inquiry whether the error was fundamental or calculated to injure the rights of the defendant. If found to be of that character,

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the defendant is entitled to a new trial, though he neither excepted to the charge nor asked further instructions. (Henry v. The State, 9 Texas Ct. App., 59; Leache v. The State, 22 Texas Ct. App., 314, where all the authorities are collated; Cook v. The State, Id., 511.)

In this case it is contended that the evidence shows no such actual breaking into the jail as the word "break" is generally used and understood to mean in common language, because the entrance was effected through an unlocked door by simply turning a bolt, without any other violence to the house. Even if this were true, in so far as the first entry by the parties into the lower story of the house is proven, this lower story was not the apartment in which prisoners were confined. The cages and prisoners were up stairs. These parties, after getting into the lower hall by unbolting the door, waited until the jailer returned, and with threats of summary violence they forced him, at the muzzle of their pistols, to go up stairs and unlock the doors and cages for them. Such force was as illegal and as effectual as if they had crushed the doors in with battering rams. If, instead of forcing the jailor thus to open the door, any one of the parties had taken the key from him at the point of his pistol and then gone up stairs and unlocked the doors with it, can it for a moment be doubted but that, in common language, it would be said, and with truth, that such party broke into the jail? We think not. When the jailor did as they commanded, it was just as though they had done the act with their own hands. "*Qui facit per alium facit per se*," is a maxim applicable in criminal as well as civil law. (Doss v. The State, 21 Texas Ct. App., 505; 6 Crim. Law Mag., 350.) Viewed in the light of the facts proven, even if it be conceded that the charge of the court was erroneous in omitting to define the word "break," the error is not fundamental, and is simply error without prejudice, which, without special exception thereto, is always harmless.

Exceptions were reserved to the acts, sayings and movements of John Williams and George Dennis, two of the parties implicated in the jail breaking, before and subsequent to the commission of the crime, and when this defendant was not present. As exhibited in the record, we are of opinion the testimony was properly admitted. A conspiracy between the parties and defendant is, we think, clearly established by the circumstances, when considered all together. What was said and done before consummation of the common design by any one or more of the

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conspirators, and in furtherance of it, was unquestionably admissible under well established rules. As to what was done in arresting and bringing back the two parties named, after the consummation of the act, and when defendant was not present, this was legitimate and admissible for the purpose of identifying all the parties connected with the crime.

There were five parties acting together. After releasing the prisoners they took them, with the jailor, out of town to a thicket, and there they got their horses and buggy and left with Henry Williams, whose rescue they were effecting, and turned the other prisoners and the jailor loose. It was night and so dark that the jailor could not see the parties, or any of them, so as to identify them, but, before they left, he went up to shake hands with the prisoner, Henry Williams, and found that the prisoner was mounted upon a roan horse, and he also saw a white or gray horse in the crowd. That night the sheriff with a posse started in pursuit, and striking a trail, they followed it for many miles until the fleeing parties separated and took different directions. The posse from this point followed one of the trails. They trailed the buggy, and followed it until they came upon John Williams and George Dennis at a deserted ranch, and one of the horses they had with them was a roan horse. They arrested and brought them back to town. As before stated, this evidence was legitimate as going to prove the identity of the parties who had committed the crime. There was no act or statement of the parties calculated in the slightest degree to injure the defendant permitted to be given in evidence. We see no error in the rulings of the court permitting the testimony in the first instance, and in refusing to strike it out in the second.

Objection was made to the testimony of Mrs. Neal Shelly, to the effect that a few days prior to the jail breaking the wife of John Williams told witness, at John Williams's house, that the defendant in this case, who was also there, was an uncle of John Williams, and that she heard John call him "Uncle Ike." If it be conceded that this testimony was hearsay, and consequently inadmissible, no injury could possibly accrue to defendant from it, because the witness Fred A. Beall, deputy sheriff of Nolan county, who knew the Williams family, testified that John Williams was a nephew of this defendant. Moreover, Mrs. Shelly identified the defendant as the party she had seen and been introduced to at John Williams's on the occasion referred to by her.

Syllabus.

It is urgently insisted that the evidence in the case is insufficient to connect this defendant satisfactorily and conclusively with the crime committed. We do not think so. On the contrary, we think the evidence, though circumstantial, fully warrants the findings of the jury. We are of opinion appellant has had a fair trial, and, having found no error in the record requiring a reversal of the judgment, the same is affirmed.

Affirmed.

Opinion delivered October 19, 1887.

No. 2599.

JOHN WILLIAMS v. THE STATE.

1. PRACTICE—CONTINUANCE—BILL OF EXCEPTIONS.—The action of the trial court in refusing an application for continuance will not be revised unless exception to such action is presented by proper bill.
2. JURY LAW—CASE STATED.—Under an established rule of practice in this State, no challenge to the array of jurors selected by jury commissioners can be entertained. The record in this case discloses that, at the previous term of the trial court, the term being then limited to three weeks, the court appointed jury commissioners to select jurors to serve at the ensuing term, and the said commissioners selected jurors to serve for three weeks. After the adjournment of the said previous term the Legislature enlarged the term of the trial court to four weeks; and, upon the assembling of court, the trial judge appointed commissioners to select jurors to serve at the next term, and caused them also to draw and select jurors to serve at the fourth week of the then term. It was before the jury thus selected to serve during the fourth week that the accused in this case was tried. His challenge to the array was based upon the ground that the jury was not selected by the jury commissioners appointed at the previous term of the court. *Held*, that the challenge was properly overruled. See the opinion in extenso on the question.
3. PRACTICE—PRIVILEGE OF COUNSEL.—Violent language used in argument by the prosecuting counsel, if the same was called forth and demanded by remarks of counsel for the defense, can not be held to constitute such an abuse of the privilege of argument as will vitiate a conviction. See the statement of the case in illustration.

APPEAL from the District Court of Comanche. Tried below before the Hon. T. H. Conner.

Statement of the case.

This is the companion case to the preceding case of *I. N. Williams v. The State*. The conviction was had under an indictment charging the appellant with breaking into the Comanche county jail on the night of April 28, 1886, and liberating certain prisoners. The report of the *I. N. Williams* case, commencing on page 17 of this volume, contains a full statement of the evidence adduced upon that trial. The same witnesses who testified upon that trial also testified to substantially the same facts in this case. The penalty assessed against this appellant was a term of two years in the penitentiary.

The subject matter of the ruling announced in the third head note of this report is embraced in the appellant's second bill of exceptions. That bill of exceptions recites that the prosecuting counsel, in his closing argument to the jury, used the following language: "The counsel for the defendant in this case keeps throwing it in my face, and asking the question: 'Where is the evidence that shows old Ike Williams to have been present at the breaking of the jail?' To this I have to reply: Gentlemen, go and examine the records of this court for last week, and you will see where a jury of twelve men have said by their verdict that Ike Williams was present at the jail. I would not go into that matter if I was not forced to do so." Signing this bill, the trial judge explained: "On the trial a number of witnesses were asked and testified that they testified on the trial of the Ike Williams case referred to in the above bill, and during the progress of the trial reference was made more than once to the Ike Williams trial. And in the argument for the defense, two at least, of defendant's counsel, to wit, Messrs. Thurmon and Jenkins, each referred to the Ike Williams trial, and, addressing the district attorney, asked: 'Where is the evidence showing that old man Ike Williams was one of the five men who broke the jail?' or words to that effect. The language of the district attorney, set forth in the above bill, was used in the closing argument, and was addressed to the counsel for the defense, in answer to their argument."

The motion for new trial raised the question discussed in the opinion.

Lindsey & Hutchinson and *J. C. Jenkins*, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

Opinion of the court.

WHITE, PRESIDING JUDGE. This is a companion case to that of *I. N. Williams v. The State*, just decided, grew out of the same transaction, and was a similar prosecution for jail breaking.

I. No bill of exception having been reserved to the court's overruling defendant's application for continuance, he is not entitled to a revision of the ruling in this court. (*Scott v. The State*, 23 Texas Ct. Ap., 522.)

II. It appears from the record that at the last previous term of the court the jury commissioners had only drawn and selected jurors for three weeks of the next term. At the time they acted, the length of the term of the district court for Comanche county, fixed by law, was three weeks. After adjournment of that term, the Legislature had lengthened the term to four weeks. When court convened the jury commissioners of the then present term were required to draw and select jurors for the fourth week of said term. The jury in this case was composed of the jurymen thus selected and drawn, and defendant challenged the array because they had been selected by the jury commissioners of the present and not of the previous term. This challenge was rightly overruled by the court. The mode and manner of selecting jurors for said fourth week was in conformity with law. (*Elkins v. The State*, 1 Texas Ct. App., 539; *Shackelford v. The State*, 2 Texas Ct. App., 385; *O'Bryan v. The State*, 12 Texas Ct. App., 118.) No challenge to the array of jurors selected by jury commissioners can be entertained. (*Id.*)

We are of opinion, independently of the cases cited, that authority for the court's action in the premises might well be predicated upon the spirit and intent of the provisions of article 3022 of the Revised Statutes. These provisions are not in conflict with article 658, Code of Criminal Procedure, but leave it discretionary with the court, "when it may deem necessary," to appoint jury commissioners where they have not been appointed in time to make selection of jurymen; and no good reason is seen why the court can not, as was done, utilize for that purpose the services of the commissioners already appointed to select for the next term of court.

III. As to the complaints made of the charge of the court, suffice it to say, the questions raised and circumstances connected with them, are identically the same as in the *I. N. Williams* case, and need no further discussion or amplification. No reversible error as to the charge is presented.

Syllabus.

IV. The language of the district attorney, in his closing speech, which is made the subject of a bill of exception, was provoked, it appears, by the defendant's counsel, and was simply an answer to remarks made by them, demanding and forcing from him a reply. Under such circumstances he can not be heard to complain. (*Pierson v. The State*, 18 Texas Ct. App., 525; *House v. The State*, 19 Texas Ct. App., 227.)

As in the *Ike Williams* case, so in this, we have found no reversible error in the judgment of conviction, and it is therefore affirmed.

Affirmed.

Opinion delivered October 19, 1887.

24	35
28	481

No. 2597.

JOHN HOLSEY v. THE STATE.

1. **PRACTICE.**—The rule obtains in this State that “whenever there is reason to apprehend that injury may have resulted to the defendant, especially in a case of felony, from a failure to observe directions given the court by the Legislature, the judgment of conviction will be reversed.”
2. **SAME.**—Subdivision 3 of article 660 of the Code of Criminal Procedure, which provides, in substance, that at the inception of the trial the prosecuting counsel shall state to the jury the nature of the accusation against the defendant, and the facts which are expected to be proved by the State in support thereof, is merely directory, and its disregard is not cause for reversal unless there be cause to apprehend that such disregard resulted injuriously to the rights of the defendant. Such probable injury is not apparent in this case.
3. **SAME—EVIDENCE.**—An inquiry as to character must be limited to the general reputation of the person impugned in the community of his residence or where he is best known, and the witness must speak from his knowledge of that general reputation, and not from his own individual opinion. If the defendant voluntarily puts his character in issue, the prosecution is entitled to rebutting evidence if it can produce it, but such evidence must be confined to the general reputation of the defendant, and can not be extended to particular acts. There is no rule of law which will permit an inquiry into the character of the defendant's associates, and in permitting such inquiry in this case the trial court erred.
4. **THEFT—CHARGE OF THE COURT—FRAUDULENT INTENT** in the taking of the alleged stolen property must be shown in order to authorize a conviction for theft, and it devolves upon the trial court to so instruct the jury affirmatively and directly.

Statement of the case.

APPEAL from the District Court of Bexar. Tried below before the Hon. G. H. Noonan.

The conviction in this case was for the theft of two mules, the property of Frank Sherwood, in Bexar county, Texas, on the first day of April, 1886. The penalty assessed against the appellant was a term of five years in the penitentiary.

Frank Sherwood was the first witness for the State. He testified, in substance, that he had seen the defendant prior to this trial, and knew that for a time he lived in the cedar brakes in Kendall county. Witness, driving a wagon drawn by a mule and a horse, and his brother driving a wagon drawn by two mules and two horses, all of which animals belonged to the witness, went into camp about sundown on the evening of April 1, 1886, at a point on the San Antonio and Boerne road, in Bexar county, Texas, about twenty-one miles from San Antonio. He hopped his said horses and mules and turned them out of camp to graze during the night, and last saw them all together at about nine o'clock. Two of the mules, a bay and a brown, disappeared during the night. From information subsequently obtained from T. M. Prince, in San Marcos, in Hays county, the witness went to the house of William Ray, about three miles from Manor, in Travis county, where he found his said mules in the possession of the said Ray. Ray exhibited no bill of sale.

B. F. Kirkendall testified, for the State, in substance, that he knew John and Bud Holsey and John Rawles, who, prior to March 31, 1886, lived together in a tent in the cedar brake, in Kendall county, about twenty miles from the twenty-first mile post out from San Antonio on the Boerne road. On the afternoon of March 31, 1886, the witness, then on his way to San Antonio, met the said Holseys and Rawles at a point on the Guadalupe river, about five miles from their tents and about twenty miles from the said twenty-first mile post. They were on horseback, and traveling towards their tents. They said they had been hunting Silas Davis's horses, but, as it was late, were going home. Witness never afterwards saw the Holseys, or either of them, or Rawles, in the cedar brake. Witness arrived in San Antonio on the next day, April 1, 1886. At a branch, about five miles out from San Antonio, the witness met Frank Sherwood, going towards Boerne.

Cross examined, the witness said that the five mile branch, where he met Sherwood on April 1, and the point on the Guada-

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lupé where, twenty-four hours before, he met the Holseys and Rawles, were about thirty-five miles apart. Witness did not, on the said March 31, see the Holseys and Rawles nearer the San Antonio and Boerne road than twenty miles. He did not know where they went to after separating from him. Witness did not know how the mules passed out of the possession of Frank Sherwood.

Z. Mott, the next witness for the State, testified that he was with Kirkendall when he met the Holseys and Rawles on March 31, 1885. The place of meeting was near the back fence of the witness's field. Witness told the Holseys and Rawles where he had recently seen some horses that looked like the Davis horses. The Holseys and Rawles came to witness's house on the next morning, at about thirty minutes by sun, and said that they went to the horses described by witness, and found them not to be the Davis horses. When they left the witness and Kirkendall, on the evening before, they went towards their homes in the cedar brakes. The defendant at that time owned a bay and a light dun horse and a wagon.

T. M. Prince was the next witness for the State. He testified, in substance, that he was city marshal of the town of San Marcos in April, 1886. Some time in May, 1886, he met Frank Sherwood, who described the mules for which he was then looking. Witness told Sherwood that on or about April 2 or 3, 1886, he saw two such mules hitched to a two horse wagon, and in the possession of a woman. Witness was then confronted with Mrs. John Holsey, the wife of the defendant, but was unable to identify her as the woman he saw in charge of the wagon and mules. Sherwood afterwards passed through San Marcos, and had in his possession two mules which witness took to be the ones he previously saw hitched to the wagon in possession of the woman.

Cross examined, the witness stated that while the woman had the mules and wagon in possession, they stood on the public square for more than an hour. Witness had never heard any one question the defendant's character for honesty, and this was the first criminal charge witness had known to be brought against him. Witness had known the defendant for several years. At this point the defendant's counsel asked witness if he knew the defendant's character for honesty. The witness asked if he was interrogated as an officer or as a private citizen. He was then asked by the counsel if he knew the defendant's reputation for honesty. He replied that he had never heard his

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honesty assailed, except that he associated with people who were supposed to be dealers in stolen stock, and for that reason was watched by the officers.

Elijah Hicks, the uncle of the defendant and his brother Bud, was the next witness for the State. He testified that he lived in Caldwell county, Texas, about seven miles northeast from San Marcos. Defendant and his wife and Bud Holsey came to witness's house on the first Sunday in April, 1886, Bud riding his sorrel horse, and defendant and his wife in a wagon drawn by two mules. Defendant's two horses which he brought with him were turned into witness pasture. Defendant and his wife, with the wagon and mules, left witness's house on the following Tuesday, and Bud Holsey two or three days later. About two weeks later defendant and his wife came back to witness's house, accompanied by John Rawles. Just before his return with his wife, defendant came to witness's house and got his horses to pull his wagon home. He said that he had been to the house of his mother-in-law, but did not say what he had done with the mules.

Mrs. M. K. Ray, an aunt of the defendant's wife, was the next witness for the State. She testified that she lived below Manor, in Travis county, about eighteen miles northeast of Austin. Witness was at her father's house in the spring of 1886, and saw the defendant and his wife and child, his brother Bud, and John Rawles, at that house. Defendant had a wagon and two mules. Witness understood that defendant sold the mules to her husband. Witness did not see or hear the trade, but understood that no bill of sale passed, and that the mules were sold to her husband on credit, to be paid for in the fall, when a bill of sale was to be executed. The trade was made between April 10 and 20. Defendant left by rail on the day after the trade, and soon returned with a pair of horses. Three weeks later Mr. Sherwood appeared, claimed and recovered the mules.

William Ray, the husband of the last witness, testified, for the State, that John and Bud Holsey and Tom Lockwood came to his house in April, 1886. Witness had never seen the man Rawles. He did not accompany his wife to her father's house on the occasion referred to by her, but joined her there three days later. He first met defendant at Lockwood's house, where the proposition to buy the mules was made by witness. Defendant accompanied witness to his house, where the trade was made. Witness executed his note for one hundred and twenty-five dol-

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lars, payable to the defendant in November, 1886, when he was to receive from the said defendant a bill of sale conveying the mules. The defendant claimed to own the mules and to have authority to sell them. Witness denied that he ever told Sherwood that he made a cash payment to defendant of fifty dollars on the mules.

The State closed.

Mrs. N. C. Holsey, the wife of the defendant, was his first witness. She testified, in substance, that the defendant, accompanied by herself and his brother Bud, left home on the morning of April 2, 1886, to visit the witness's mother, who lived in Travis county. Defendant and his brother Bud did not leave the defendant's house during the day preceding their departure on the said visit. Witness could not remember where they camped on the first night out. They camped on the second night (April 4) on York creek. They were then traveling in the defendant's wagon, drawn by the defendant's two horses. While camped on York creek, John Rawles came to them having in his possession the two mules afterward claimed by Mr. Sherwood. These two mules he traded to the defendant for one of his horses and thirty-five dollars in money, which the witness provided. Rawles left with the horse and money, leaving the two mules in camp. The journey was then resumed, the two mules being worked to the wagon and Bud Holsey riding the remaining horse. The party having in their possession only the wagon, the two mules and the one horse, reached the house of Elijah Hicks, in Caldwell county, on Sunday. They remained at Hicks's two or three days and went on to witness's mother's house. Defendant sold the two mules to William Ray for one hundred and twenty-five dollars, on credit, taking his promissory note.

Defendant went back to Hicks's house and borrowed a horse of Hicks to work with his horse in getting back home.

Cross examined, the witness reiterated that the defendant took but one horse to Hicks's house. The party did not pass through the town of San Marcos, but, going east through New Braunfels, traveled the Boerne and New Braunfels road. John Rawles was not at defendant's house on April 2, when the journey was commenced, nor on the day before. Defendant did not leave his house on April 1, and could not then have been in Z. Mott's neighborhood. Defendant and Bud Holsey did make a search for Davis's horses, for Mrs. Davis, but that was three or four days prior to April 2.

Statement of the case.

Mrs. B. R. Holsey, the defendant's mother, testified, in his behalf, that she was present when defendant, his wife and brother, left home on the morning of April 2, 1886, to visit Travis county. They left in defendant's wagon, drawn by defendant's two horses. Some time after they left, John Rawles, whom witness had not seen for two or three days, came to the house leading two mules, for which he said he had traded two horses, with a Mexican. He asked for defendant and his brother. Witness told him that they had started to Travis county. About mid-afternoon, Rawles left with the mules, saying that he was going on a visit to his sister, near Austin, in Travis county.

On her cross-examination, the witness stated that the defendant and Bud Holsey were at home throughout the day of April, 1. Rawles was not there on that day, nor was he there on March 31. When defendant and his wife got back from Travis county, they had one of defendant's horses, and one of Elijah Hicks's horses. Rawles came to the house a few days later, and said that he had been to see his sister, who lived in Travis county. Witness's daughter was present when Rawles brought the two mules to witness's house, on April 2, 1887. The two Holseys were at home all day on March 31, and consequently could not have been horse hunting with Rawles.

Mrs. Scott, the mother-in-law of the defendant, testified that, on the morning following the arrival at her house in Travis county of defendant, she saw John Rawles riding a horse which she knew to have belonged to defendant. Rawles was frequently at witness's house. While at witness's house, defendant sold two mules to William Ray. He then went off by rail, and returned with two horses to pull his wagon home.

The material part of the testimony of J. L. Holsey, the defendant's father, was, that defendant started to Travis county on the morning of April 2, driving his own horses. He returned with one of his own and one of Elijah Hicks's horses.

The cross-examination of this witness elicited nothing material except his statement that the defendant and Bud Holsey spent the day previous to their departure for Travis county, hunting Silas Davis's horses. He did not see Rawles on that day. Several witnesses were introduced who supported the defendant's reputation for honesty, and the defense closed.

Elijah Hicks, being recalled by the State, in rebuttal, testified that defendant with his wife and brother, Bud, brought to his house on the first Sunday in April, defendant's two certain sorrel

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horses, which the witness knew well, and two mules. The two horses described were the horses afterwards used by defendant to draw his wagon back home.

The motion for new trial raised the questions discussed in the opinion.

No brief for the appellant has reached the Reporters.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. Article 660 of the Code of Criminal Procedure, which prescribes the order in which a trial before a jury shall be conducted, provides in subdivision 3 that "the district attorney or the counsel prosecuting in his absence, shall state to the jury the nature of the accusation and the facts which are expected to be proved by the State in support thereof." This subdivision of said article we construe to be merely *directory*, and a disregard thereof is not, in our opinion, per se such error as invalidates a conviction.

"Wherever there is reason to apprehend that injury may have resulted to the defendant, especially in a case of felony, from a failure to observe directions given the court by the Legislature, we think, unquestionably, the judgment should be reversed." (*Campbell v. The State*, 42 Texas, 591.) There is no apparent reason for apprehending that a disregard of the direction contained in subdivision three resulted injuriously to the defendant, and it is not made to appear in the record that any injury did result to him therefrom. This requirement is quite different from that contained in subdivision one of said article, and which this court has held to be mandatory, and a disregard of which is per se material error, although injury to the defendant be not shown to have resulted therefrom. (*Wilkins v. The State*, 15 Texas Ct. App., 420; *White v. The State*, 18 Texas Ct. App., 57.) The hold, therefore, that the error complained of in defendant's bill of exception number one is not a material one.

We will remark, however, that in the conduct of trials the directions prescribed by the statute should be strictly followed, and especially when those directions are insisted upon by the defendant. The Legislative will, when plainly expressed, should be observed and rigidly adhered to by the courts in matters of practice, as well as in all other respects.

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When the defendant has voluntarily put his character in issue, the prosecution may introduce evidence in rebuttal, but ordinarily such rebutting testimony must be confined to general reputation and can not be extended to particular acts. An inquiry as to character must be limited to the general reputation of the person in the community of his residence, or where he is best known, and the witness must speak from his knowledge of this general character, and not from his own individual opinion. (Brownlee v. The State, 13 Texas Ct. App., 255; Wharton's Criminal Evidence, section 61.) The evidence as to character should be confined to the *defendant's* character alone, and the inquiry should not be extended to the character of others connected with him, or with whom he may associate. We know of no rule of evidence which authorizes an inquiry as to the character of a defendant's associates. In the case before us such evidence was admitted over defendant's objection, and was clearly calculated to operate to his prejudice. Because of this error the conviction should not be permitted to stand.

There is a defect in the charge of the court, which, though not excepted to, we think proper to notice. In defining theft, it omits the word "fraudulent," and the jury are no where in the charge directly instructed that to constitute theft there must be a *fraudulent* taking of the property. Considering the charge as a whole, it inferentially means that the taking must have been *fraudulent*, but, as the fraudulent intent is the very gist of this offense, the jury should have been directly and plainly so instructed. In other respects, the charge of the court does not appear to be objectionable in any material particular.

Because the court erred in admitting the testimony of the witness Prince, relative to the character of the defendant's associates, and that because of the character of said associates the defendant had been under the surveillance of the officers; and also because of the error in the charge above mentioned; and, further, because of the unsatisfactory and inconclusive character of the evidence upon which the conviction is based, the judgment is reversed, and cause is remanded.

Reversed and remanded.

Opinion delivered October 22, 1887.

Opinion of the court.

No. 2462.

FELIPE ARRELLANO v. THE STATE.

MANSLAUGHTER—SELF DEFENSE—CHARGE OF THE COURT.—See the opinion and the statement of the case for evidence on a murder trial, which, while it did not demand a charge upon the law of self defense, was of such character as to demand a charge upon the law of manslaughter.

APPEAL from the District Court of Duval. Tried below before the Hon. J. C. Russell.

This conviction was in the second degree for the murder of Augustin Perez, in Duval county, Texas, on the fifth day of August, 1884. The penalty assessed was a term of thirty years in the penitentiary.

The opinion sets out in full the testimony of Eusebio Carrillo, the first witness for the State.

The substance of the testimony of Julian Palacios, the second witness for the State, was that, as justice of the peace, he held the inquest on the body of the deceased. He saw the body about thirty minutes after the death. He could not now describe the wounds. He did not see the defendant after the killing, but saw him about eleven o'clock on the day of the homicide. He could not now say whether or not the defendant was then drunk.

The testimony of the several witnesses for the defense, none of whom claimed to witness the shooting, was to the effect that, as late as two o'clock on the day of the homicide, which was near the time of the shooting, the defendant was drunk.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This is a conviction for murder of the second degree, the punishment being assessed at thirty years confinement in the State penitentiary.

Concerning the facts immediately attending the homicide, Eusebio Carrillo, a witness for the State, testified as follows:

"I knew Augustin Perez; he is dead now; he died August 5,

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1884. Defendant killed him with a pistol in the town of Concepcion, in Duval county, Texas, at the house of Andreas Delgado. I was present when defendant killed deceased. The deceased and I were at Delgado's, burning trash in the yard. The deceased was raking up trash with a hoe, when the defendant rode up on horseback and saluted us. Defendant said that this man—meaning deceased—had said that he, the defendant, had stolen some horses, and used some profane language to deceased. Then deceased laid down his hoe and went up to defendant and seized the bridle of his horse with one hand and caught hold of one of defendant's hands with his other hand. They then had a kind of melee around the yard, the defendant being on his horse. I did not see any blow struck by either party, but I saw a pistol in the hand of defendant. After a while deceased let go his hold on the bridle of defendant's horse and also let go of defendant's hand and started toward the house; and then, while deceased was going toward the house, defendant shot him once, and as he was about to enter the door of the house he shot him again; he shot him twice. Defendant was close to deceased when he shot him. After the shooting defendant rode out of the yard on horseback. Defendant was living at Concepcion at the time. I don't know how long he had been living there. I did not see him after that until I saw him here in court. I don't know how long I have known defendant, but about a year before the shooting took place. I had seen him often. There were other houses near where the shooting took place. I know Francisca Longoria. About twenty yards from where the shooting occurred there was nothing to obstruct the view from the house where Francisca Longoria lived to where the killing occurred. The killing occurred about two or three o'clock in the afternoon. When I first saw the pistol of defendant was when he and deceased were whirling around. Defendant had his hand up with the pistol in his hand. I saw no blow struck, neither did I hear anything spoken by either defendant or deceased at this time. I was about five varas from defendant and deceased when the shooting occurred. Deceased was about eight varas from defendant when he laid down his hoe and started toward him."

Counsel for appellant requested instructions upon the law of manslaughter, which were refused.

If appellant provoked the difficulty, or produced the occasion for the purpose of slaying the deceased, he would be guilty of murder. On the other hand, if this was not his intention, then

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a charge on manslaughter was demanded by the facts. Hence the necessity for submitting to the jury the law governing the case in which the accused provokes the difficulty, as well as the law of manslaughter, so that the jury can pass upon the truth of these propositions.

We do not think the evidence required a charge upon self defense; neither need the action of the court in overruling the application to continue the case be reviewed.

Because of the error in the charge indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered October 22, 1887.

No. 2608.

MODESTO GRANGER v. THE STATE.

MANSLAUGHTER—AGGRAVATED ASSAULT—CHARGE OF THE COURT.—See the opinion and the statement of the case for evidence adduced on a trial for assault with intent to murder *held* not to demand of the trial court a charge upon the law of manslaughter, or upon the law of aggravated assault.

APPEAL from the District Court of Webb. Tried below before the Hon. J. C. Russell.

The conviction in this case was for an assault with intent to murder one Espiralon Devolino, and the penalty assessed was a term of two years in the penitentiary.

But two witnesses testified upon this trial, both appearing for the State. They testified, in substance, that they and Devolino, the alleged injured party, were engaged in a game of cards, at the saloon of one DeLeon, in the city of Laredo, Texas, on the night of June 12, 1885. The stakes wagered were checks representing the price of a glass of beer. While thus engaged, the defendant entered the saloon and took one of Devolino's checks. Devolino asked him why he took it. He replied that he took it to pay for a drink. Devolino replied that he, defendant, had no right to take the check, and had better go to work and earn his

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drink checks, and not persist in "making his living at the sacrifice of his mother." Thereupon the defendant passed behind the counter of the saloon, secured a pistol, returned, pointed it towards Devolino and fired. The ball missed Devolino's head, and buried itself in the wall of the house. Devolino threw a chair into the middle of the room and fled. Defendant then surrendered the pistol to the bar tender.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This was a conviction for an assault with intent to kill and murder. A single question is presented for review: Did the charge require a charge on manslaughter, and hence on aggravated assault?

The prosecuting witness was engaged in playing a game of cards in a saloon. Appellant entered, went up to the table and picked up a chip belonging to the witness, one Devolino. Being asked by witness "why he did that?" appellant replied, "I am going to pay for a drink with the chip." Witness replied, "you have no right to do so; you always get your drinks that way; you had better go to work, and not make your living at the sacrifice of your mother." Appellant then walked to the counter and took up a pistol, made a step towards the table and fired at witness. This is the prosecutor's account of the affair, and he is corroborated by all the witnesses. The bar tender, however, states that the witness as to the material facts, Devolino, told appellant that he "ought to go to work for his drinks, and not get his living at the sacrifice of his mother."

Certainly it can not be contended that this was insulting language towards appellant's mother. He had no reasonable ground to, and could not put such construction on this language.

There was no error in failing to charge the law of manslaughter and aggravated assault. The judgment is affirmed.

Affirmed.

Opinion delivered October 22, 1887.

Statement of the case.

No. 2613.

J. T. MELTON v. THE STATE.

1. **MURDER—MANSLAUGHTER.**—The evidence in this case shows clearly that the defendant provoked the difficulty and killed the deceased because of insulting and defamatory language applied by the latter to defendant's daughters, but that he did not do so upon his first meeting with the deceased after being informed of the insulting and defamatory language. *Held*, that the defense of manslaughter, based upon such language, does not arise in the case.
2. **SAME—SELF DEFENSE—FACT CASE.**—See the statement of the case for evidence *held* not to raise the issue of self defense, and to be sufficient to support a conviction for murder in the second degree.
3. **SAME—CONTINUANCE** to secure absent testimony is properly refused if, in view of the evidence adduced on the trial, the absent testimony appears not to be probably true.

APPEAL from the District Court of Cass. Tried below before the Hon. W. P. McLean.

This conviction was in the second degree, for the murder of Thomas Braden, in Cass county, Texas, on the twenty-sixth day of April, 1887. The penalty assessed against the appellant was a term of fifteen years in the penitentiary.

Valentine Waites was the first witness for the State. He testified, in substance, that he was present and witnessed the shooting of Thomas Braden by the defendant. The shooting occurred on the morning of April 26, 1887, at or near the "Y" switch of the Texas & Pacific Railway, in Cass county, Texas. The witness was engaged in unloading hay from a box car when the shooting took place. Witness observed the deceased when he drove up to the "Y" switch with his wagon loaded with lumber. About the same time he observed the defendant at the switch with a wagon load of cross ties. The deceased, when he arrived at the switch, proceeded to unload his wagon. He and his wagon were then more than sixty yards distant from the defendant and his wagon. When the witness next observed the defendant, the latter had left his wagon, and was going towards the deceased, carrying his shot-gun with the butt under his arm and the muzzle pointing towards the ground. As the defendant approached the deceased, he said something in a choked, angry voice, which

24	47
28	220
29	378

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witness did not understand, and to which the deceased replied: "Don't come about here bothering me at my work." At this time the defendant and deceased were about twelve steps apart, advancing upon each other, the defendant with his gun in his hands, and the deceased with his hands empty and hanging at his sides. At this juncture the witness turned his back to the parties, and presently the gun fired. Witness then looked towards the parties and saw them about fifteen feet apart, both advancing, the defendant still armed with his gun, and the deceased with his empty hands still hanging at his sides. When the two men came together, they clinched, fell and disappeared from the witness's view, behind the deceased's wagon.

Witness then went to the parties and found them on the ground, the deceased on top of the defendant. They were not then making any efforts to hurt each other. A man named Anderson, standing near by, had secured the defendant's gun. The deceased either got off or was dragged off defendant by some one, and the defendant got up, secured his gun from Anderson, and said to deceased: "I would not have shot you if you had not scandalized my girls." Witness then observed that deceased was shot through the thigh, and was bleeding profusely. He was taken from the ground, placed on a litter, and carried to Dick McDuff's house, where he died about three hours later. When the witness first observed the deceased on the morning of the homicide, he was unloading his wagon. He first saw the defendant as the latter drove up to the switch. In going to the switch, the defendant crossed the railroad, passing the deceased at a distance of between sixty and seventy yards. Arriving at the switch, he unloaded his wagon and then drove back across the railroad. When he reached a point about sixty yards distant from the deceased, he stopped his wagon, got off and started towards or in the direction of the deceased. Deceased, on being shot, fell at a point about twenty yards distant from his own wagon, and about forty yards distant from the defendant's wagon. While the parties were on the ground, and the deceased on top of the defendant, the witness observed a pistol, the barrel of which was protruding through a hole in the lining of the deceased's coat. Deceased made no effort to place his hand on his pistol. When the gun was discharged, the defendant had advanced about forty yards upon the deceased, and the deceased had advanced about twenty yards upon the defendant.

Joseph Hill was the next witness for the State. He testified,

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in substance, that, en route to the "Y" switch, on the morning of April 26, 1887, he met the defendant in his wagon, going from the said switch. Defendant, who had his shot gun with him, told witness that he had just shot but had not killed the deceased. He did not say why he shot deceased.

Will Taylor was the next witness for the State. He testified, in substance, that on the Sunday preceding the Tuesday of the homicide, he and George Henderson visited the house of the defendant, where they found the defendant and his family, and A. E. Parker and a young man named Crain. Soon after witness's arrival, defendant and the said Parker left the house together, and soon returned. The defendant then called to the witness, who went with him to a point a short distance from the house, where they had a short talk. When witness returned to the house, A. E. Parker asked him what the defendant had said to him. Witness replied that the "old man would settle the matter himself." The witness and Henderson remained at the defendant's house but a short time.

On the following morning the witness went with a wagon to a point on the "Y" switch and Temple mill road, where he had previously left a load of lumber, and, while loading it on his wagon, Dick Parker's wagon drove up. A. E. Parker, who was in that wagon, got into the witness's wagon and rode with witness to the "Y" switch and then back to the Temple mill, to get another load of lumber. En route from the switch to the mill, after giving witness a drink of whisky, A. E. Parker told witness that Tom Braden, the deceased, had been talking about witness's sister. The two then pursued their journey until they met the deceased with a load of lumber. Parker accosted the deceased and said to him: "I understand that you have reported that, at Jackson's party, you saw me with my knees between the legs of one of J. T. Melton's daughters." Deceased replied: "I said it." Parker said to him: "You are a G—d d—d lying son of a bitch. You have got that to take back or I will kill you." Deceased replied: "I can not take it back, for I can prove what I saw and said." Parker responded: "You will prove a d—d lie." At this time Parker had an open pocket knife in his hand. Deceased bent over as if he intended to start at Parker. Parker raised his knife, whereupon the deceased stopped and remarked: "You boys have got me foul." Parker put his knife in his hip pocket and pulled off his coat. Deceased started to leave, when witness, who had his knife out, caught his shirt collar and said: "Hold

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on! We are not done with you yet." Deceased jerked loose and fled, leaving a piece of his shirt in the witness's hand. Witness pursued deceased about twenty feet, and cut at him once with his knife. Failing to overtake deceased, witness abandoned the pursuit, and he and Parker then went to defendant's house, which was off their road, to mill.

At a point about one hundred yards from his home, the defendant was seen attempting to catch a horse. Before reaching the house Parker hallooed to defendant: "D—n him, he says he said it; let's get our guns and go and kill him"—referring to the deceased. Defendant agreed, and he, Parker and witness started on to the house. En route, defendant proposed that, if witness would kill deceased, he and Parker would swear on trial that he did it in self defense. Witness refused. The parties then entered the house, where defendant got his shot gun and Parker a pistol. They then started up the road in pursuit of the deceased, with the declared intention of killing him. Mrs. Melton, the wife of the defendant, asked witness to follow and prevent the killing. Witness followed to prevent the parties from killing deceased if he could. When he overtook the parties, Parker ordered witness to go back. Defendant repeated the order, with a threat to shoot the witness if he did not go back. Witness turned back, and defendant and Parker rode on towards the mill. This was about eleven o'clock a. m. Some time later Parker returned to the house and said that the defendant was down the road and would kill deceased, and asked the witness to remain at the house and afterwards to join him in swearing to an alibi for the defendant, which witness declined to do.

Immediately after dinner the witness and Parker got into witness's wagon and went to the mill. Defendant had not yet returned to his house. Parker took his valise and fiddle with him. Upon arriving at the mill Parker went to John Foster's house and got a double barrellled shot gun. Foster asked him what he was going to do with the gun. He replied that the gun might kill a man before night. Foster replied to this: "Yes, a man's hog." Parker responded to this: "Yes, one that will weigh about one hundred and eighty pounds." Parker then went to the mill shed, stood the gun up against a tree and passed into the shed. He soon came out, got his gun and joined the witness at the wagon. Witness then observed the defendant on his horse near the door of Henderson's "commissary." He had his gun in his hands. He soon joined witness and Parker at the wagon, and

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asked if either had yet seen the deceased; to which question they replied in the negative. Looking around at this time, the witness saw the deceased at a lumber pile, about sixty yards distant. There was no obstruction of any kind between deceased and the defendant, witness and Parker, and there was no reason why the defendant could not then see deceased. At this point of time Parker said to defendant: "We had better put off killing Braden until some other day. It won't do now; he has too many friends here." After some further conversation the parties left the mill, Parker going with witness on his wagon, taking with him his valise, fiddle and the shot gun. Before separating from witness at a point on the road about a half mile from the mill, Parker remarked that he would "kill Braden before the sun rose and set twice more."

Reviewing his testimony, this witness stated that, during the difficulty between himself, Parker and deceased, in the forenoon, he knew that Parker was armed with a pistol and a knife. Deceased had a whip in his hand at that time. Some time subsequent to the killing of Braden, the defendant told the witness that, while he was at witness's wagon near Henderson's commissary, on Monday, the day before the killing, he saw Braden, who was then at the lumber pile, and that he would have killed him then but knew that Braden then had too many friends about the mill. When Parker left witness, on the day before the killing, on the road, he left the shot gun in witness's wagon, to be taken to the mill and given to defendant, with directions to return it to the owner. The witness was under indictment as an accomplice to this murder, and for assault with intent to murder Braden. He was testifying under promise from the district attorney to dismiss both prosecutions against him.

Dick McDuff was the next witness for the State. He testified, in substance, that he lived at the "Y" switch, and was at home at the time of the homicide. He heard, but did not see, the fatal shot fired. He repaired immediately to the place of the shooting, when he found the deceased lying on the ground, very weak from the loss of blood. Defendant was then standing a few feet distant from deceased. Witness had deceased taken to his house. After he was put to bed, the deceased asked that all persons save the witness should leave the room. When they had done so, deceased told witness to take his pistol from his coat pocket and keep it for him. Witness got the pistol from the coat

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pocket, where it was loosely carried. If any part of the pistol had worked through the lining the witness did not observe it.

Lon Dennis testified, for the State, in substance, that he was at Henderson & King's mill, otherwise known as the Temple mill, on Monday, the day before the killing of the deceased. While there he saw the deceased at one of the dry lumber kilns, loading a wagon with lumber. While he was thus engaged the witness saw the defendant ride up to the commissary and enter into a conversation with Mr. Tom Henderson. Thence he rode to the wagon of Mr. Will Taylor, where Taylor and A. E. Parker then were. There was no obstruction between the points where the wagons of deceased and Taylor were standing. The distance between them was not more than seventy-five yards, and there was no reason why defendant did not then see the deceased. Defendant was then armed with a double barreled shot gun. The witness could not say that defendant then saw the deceased, but, in going to Taylor's wagon, he rode towards the deceased, who, with a Mr. Bush, was then loading his wagon.

T. J. Henderson was the next witness for the State. He testified, in substance, that he was one of the proprietors of the mill known as Henderson & King's mill, or as the Temple mill. That mill was situated in Cass county, Texas, about three and one-half miles distant from the "Y" switch of the Texas & Pacific railway. The deceased, at the time of his death, was in the witness's employ, his business being to haul lumber from the mill to the switch. Between one and two o'clock p. m., on Monday, April 25, 1887, the day before the homicide, Will Taylor and A. E. Parker, riding in Taylor's wagon, arrived at the mill. Parker got out of the wagon near the witness's commissary store, and went to the house of John Foster, where he got a double barreled shot gun. When he came back Foster asked him what he was going to do with the gun. He replied that it might kill a man before night. Foster replied, "Yes, a man's hog." Parker replied: "A hog that will weigh about one hundred and eighty pounds." Parker then told Foster good bye and walked off toward the dry kilns, where Taylor was loading his wagon. About five minutes later the defendant, on horseback, and armed with a double barreled shot gun, rode up to the commissary store and bought a box of axle grease. He then rode off towards the dry kilns, where Taylor and Parker were then loading Taylor's wagon with lumber. Those kilns were in the direction of the sheds where the deceased kept

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his mules. Braden usually got his second load of lumber between one and two o'clock p. m. Deceased was about twenty-five years old, and weighed about one hundred and eighty-five pounds.

N. Bush testified, for the State, that he was at the mills at about two o'clock on Monday, the day before the homicide. He and deceased were at the dry kiln, near the shed, loading deceased's wagon, when defendant, armed with a shot gun, rode up to the commissary store, and thence to the wagon at which Taylor and Parker were at work. Taylor's wagon and deceased's wagon were then about sixty yards apart. The witness knew as a fact that the deceased saw defendant on that occasion. While he could not testify that the defendant saw the deceased, he could imagine no reason why he did not, as he rode directly toward witness and deceased, over perfectly clear and unobstructed ground. Witness and Braden changed work that evening, the witness driving that load to the switch for Braden.

George Henderson testified, for the State, that on Sunday, the second day preceding the homicide, he and Will Taylor went to the defendant's house, where they found the defendant, his family, A. E. Parker and Jesse Crain. Soon after their arrival defendant and Taylor left the house together, engaged in a short private conversation, and then returned. On the return of the parties, Parker asked Taylor what the old man, meaning defendant, said to him. He replied: "He says he will settle it himself." This private conversation between defendant and Taylor was preceded by a short private conversation between Parker and Taylor. Witness heard neither of the conversations alluded to. Witness and Taylor left defendant's house together at about nine o'clock on that evening, leaving Parker there.

On the next night, which was Monday, the night preceding the homicide, the witness saw Will Taylor at Henderson & King's commissary store, near the mill. Taylor then had a large stick in his hand. Witness remarked to him: "You must be going to do some fellow up with that big stick." Taylor replied: "I am going to knock Tom Braden on the head if he comes out of that commissary, and, if necessary, I know where to get my shot gun; it is not more than twenty steps off." Deceased was then in the commissary store. Previous to that time, Parker, in the presence of witness, loaned a gun to J. W.

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Foster, and told Foster to give the gun to the defendant when he got through wolf hunting with it. The State rested.

Wyatt Alexander was the first witness introduced by the defense. He testified, in substance, that he was present at the "Y" switch of the Texas & Pacific railway at the time of the homicide. At the time of the shooting the witness was engaged in loading one of the box cars of the said railroad with lumber. He saw the defendant get off his wagon near the switch, and start towards the deceased, who was then unloading a wagon at another point not far from the switch. Witness then observed that the defendant and the deceased were then advancing upon each other, the defendant armed with a shot gun. Defendant said something to deceased which witness did not understand. Deceased then dropped down behind a lumber pile. Defendant continuing to advance, deceased came out from behind the lumber and started towards the defendant. When the parties approached within about fifteen feet of each other, defendant called to deceased not to approach any closer. Witness then turned his back and the gun fired. Witness then ran to the parties, and found Braden lying on the ground, shot through the left leg. He then saw a pistol in Braden's coat pocket. The muzzle had worked through a torn place in the lining of the coat, and was plainly visible. On that morning, some time before the shooting, Braden told witness that if he saw a man with a gun about the switch during the day, to keep his eye on him. On that same morning Will Taylor was at the switch with a gun, which he left with Dick McDuff.

Joe Hill was the next witness for the defense. He testified, in substance, that, about a week before the homicide, and shortly after a certain party at the house of one Jackson, he had a conversation with Braden about one of the daughters of defendant. That conversation occurred on the lumber road, about three-fourths of a mile from defendant's house. Braden said that he attended Jackson's party and detected A. E. Parker and one of the Melton girls in a compromising position; that during the night he saw Parker in Jackson's dining-room wallowing over one of the Melton girls; that they sat facing each other, Parker with his knees between the girl's knees. Witness asked deceased why he talked in that manner of Melton's family. He replied that he did not like the "God d—d stock." The witness repeated this conversation to Melton at about nine o'clock a. m., on Monday, the day preceding the homicide. Melton had previously heard

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of Braden's statements about his daughters, and asked witness if Braden had ever made them to him. Will Taylor and A. E. Parker asked witness about Braden's statements to him concerning the girls, but witness said nothing to them about it. Witness saw Braden on the morning of and before the killing. Braden then told witness that he had not seen old man Melton since he heard, a few days before, of Melton's threats to kill him about his statement concerning the girls.

Lon Jenkins testified, for the defense, that he attended a party at T. J. Henderson's house in January, 1887. While dancing with Miss Addie Melton, at the head of a set near the door, the deceased, who was standing in the door, said to witness: "Lon, she is too fast to be decent," referring to Miss Addie Melton. This occurred at about nine o'clock.

Miss Addie Melton, the daughter of the defendant, corroborated the testimony of the witness Jenkins, declaring that, while dancing with Jenkins at Henderson's party, she distinctly heard Braden say to Jenkins: "Lon, she is too fast to be a decent girl." On her return home that night, witness told her mother what deceased said about her, but did not tell the defendant at that time, fearing that she would precipitate a difficulty between him and Braden. She, however, told him on the day before the killing, having ascertained that he had been informed of other slanders uttered against her by deceased.

Mrs. Melton, the wife of the defendant, was his next witness. She testified that Taylor and Parker came to her house on Monday, the day before the killing, and told her, Taylor doing the talking, that they had met the deceased on the lumber road, and that deceased said that he saw Parker, at Jackson's party, sitting with his knees between the knees of one of her daughters. Defendant soon came in, when Taylor related the same thing to him. When Taylor left the room the witness and defendant proceeded to talk the matter over. Witness begged defendant to pay no attention to what Will Taylor had said, inasmuch as he was unworthy of belief, was a mischief maker, and in the habit of traveling over the country, telling lies and getting people into difficulties. Witness's advice seemed to anger the defendant. The witness emphatically denied that defendant and Parker left the house to pursue Braden on that day, or that she sent or asked Taylor to follow and bring them back. She did not know at what hour defendant left home that day, nor

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whether he left at all or not, nor whether he rode or walked, nor whether or not he took his gun.

Mrs. Baughman, the sister of Mrs. Melton, and the aunt of the Melton girls, was the defendant's next witness. She testified that she attended the Jackson party with her neices as their chaperone. She took a great pride in her neices. Their deportment on that and all other occasions was conspicuously proper and modest, and their general carriage and behavior had never been excelled by any lady of the witness's acquaintance. The dining room in Jackson's house, in which it was reported that Braden discovered Parker and Addie Melton in a compromising situation, was a side room in which a light was kept burning throughout the night. The room stood open all night, and the guests were continually passing in and out of the said room, partaking of the supper therein spread.

J. A. Culpepper was the next witness for the defense. He testified that he boarded at the house of the defendant in April, 1887. On the eighteenth day of that month he went to the "Y" switch, to see about the inspection of some ties. While there he met Braden for the first time. He asked Braden if he had seen the tie inspector on that morning. Braden replied that he had not, and asked witness if he was not one of the men who boarded at Melton's, and if he knew one Culpepper. Witness replied that his name was Culpepper and that he boarded at Melton's. Braden then remarked: "I suppose you know the Melton girls?" Braden then said: "Well, they remind me, more than anything else, of bags of —" (using a vulgar term for excrement). After this the witness got on Braden's wagon and rode with him as far as he went towards Melton's house. On the road, Braden made to the witness substantially the same statement he made to Taylor about the conduct of Parker and Addie Melton at Jackson's party, and added that he talked about Melton's people because they were not respectable, and that his reason for believing them to be not respectable was that they were not visited by respectable people. Witness was at Melton's house at the time of the shooting. He did not know when Melton left home to go to the switch on the morning of the shooting. When Melton came home after the shooting, he told witness that he had shot Braden, and asked witness to haul his remaining load of ties to the switch for him, which the witness did. It was not until after the killing that witness told Melton of Braden's statements about his daughters.

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John Dana and Bill Bryant were respectively introduced as witnesses for the defense. They testified that they attended the Henderson party in January, 1887, and saw and talked with Braden at that party.

At this point the defense rested.

T. J. Henderson, recalled by the State, testified, in rebuttal, that the only party at his house ever attended by the Misses Melton was the party given by him in January, 1887. Witness saw Braden on the evening of that party, invited him to attend, and gave him a written invitation for the family of his step-father, Parson Harrison. Braden was then dressed in his work day clothes. When Braden returned to the mill from his step-father's house, late on that evening, he still had on his working clothes, from which fact the witness concluded that he had decided not to attend the party. Braden left again about dusk, going towards his step-father's house, a mile distant, and witness did not see him again until next morning. Witness attended the party, mixed with the people in the house and outside, at the commissary and at the mill, and if Braden was about the place on that night he did not see him. He could probably have been there, though not seen by witness. Witness knew Braden well. He had never heard Braden use an oath.

Buck Parker testified, for the State, in rebuttal, that he and Braden roomed together in Henderson & King's mill, in January, 1887. Braden took his meals at his step-father's house, except his dinner, which he always brought with him from breakfast in a tin bucket. Witness did not attend the party at Henderson's in January, but was at the door once at about nine o'clock on that night. He saw the Melton girls there, but did not see Braden. Braden left the mill about dusk on that evening, to go to his step-father's. Witness next saw him when he came to work on the next morning, with his bucket of grub on his arm. Witness had never heard Braden use an oath.

Parson Harrison, the step father of Braden, testified, for the State, that he did not approve of dancing parties, and never permitted any member of his family to attend one. He remembered the party at Henderson's, in January, 1887. He knew as a positive fact that Braden did not attend that party. On the contrary, he came to witness's house about dusk on that evening, and did not leave it again until after breakfast on the next morning. Witness had never heard Braden use an oath.

Pate Murph testified, for the State, that he knew the reputa-

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tion of the Melton girls for chastity and virtue. It was bad, and was bad for two years prior to the Jackson party. Witness had heard several persons speak of the reputation of the girls, but could recall only the names of Mr. Patrick, Mr. Frances and Ab Gholson. He knew of no particular act of unchastity committed by them, nor could he recall that he ever heard of a specific act of unchastity. Gholson once told witness that Baughman once told him that one of the Melton girls wallowed all over him. On one occasion the witness saw one of the girls in Atlanta, Texas, with Ed Stewart. Stewart was then too drunk to walk straight, and the Melton girl was helping him along.

J. W. Frances testified, for the State, that the reputation of the Misses Melton for chastity was bad. He had often heard their reputations pronounced bad, but could remember the name of only one of his informants, his daughter, now living in Western Texas, who told him that at Jackson's party she saw Parker sitting in front of Addie Melton with his knees between hers. Independent of these reports, the witness could pronounce the girls to be of bad character only from the fact that they were notoriously bad behaved girls at church, and attended church at night with young men.

Theophilus Piles testified, for the State, that the reputation of the Melton girls for chastity was bad. He could not recall the name of any particular person he had heard say so, but knew the fact to be neighborhood talk. Once at singing school, Addie Melton told the witness that she and Parker were in the habit of biting each other; that she would bite Parker one morning, and Parker would bite her the next; that she forgot to bite Parker on one particular morning, and on the following morning bit him so hard that she broke a tooth. Respectable people did not visit the Meltons. The witness did visit them. He had nothing to do with the question of his sister visiting them; "the old man controls her." Witness would not testify that the Melton girls were not virtuous.

Mr. Patrick testified, for the State, that the reputation of the Melton girls for chastity was bad. He could not name any one person he had ever heard say so. On one occasion the girls and Parker visited witness's house. One of the girls stood up in a swing and had the swing propelled towards Parker, who stood in front of her. She would kick at him, and he would catch at her feet. Afterwards Parker and the girl sought a seat on a log.

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They amused themselves by pinching each other in the sides, on the legs and on the thighs. Witness could not swear that the girls were not in fact virtuous.

Harrison Daniels and Parson Dougherty testified that the reputation of the Melton girls for chastity and virtue was bad, but based their opinion only upon their bad behavior at church.

The State closed.

P. Frazier and Mr. Jackson testified, for the defense, that so far as they knew, or had ever heard, the Melton girls sustained an irreproachable reputation for chastity and virtue until the circulation of the report concerning the conduct of one of them at the Jackson party.

Ab Gholson testified, for the defense, that what he said to the State witness Pate Murph about young Baughman's statement about the Melton girl was said in the presence of his family, and with no purpose to reflect upon the girl. What he did say to Murph was that Baughman, a weak minded boy, meaning nothing he said, remarked to him that he had a nice time with the Melton girl on a certain journey in a wagon; that the wagon was small, crowded them, and in speeding over the road jolted him and the girl together.

In his motion for continuance the appellant alleged that he expected to prove by one witness that he did not see Braden on Monday, the day before the killing, and that the killing occurred on the first meeting with deceased after being informed of the insulting language. That by another witness he expected to prove that, on the day previous to the killing, Braden exhibited a pistol with which he declared his intention to kill the appellant if the latter said anything to him about his statements concerning his daughters. That by two other witnesses he expected to prove that, when the fatal shot was fired, the deceased was advancing upon appellant, making at the same time strenuous efforts to draw his pistol, and that appellant twice ordered him to desist before firing the fatal shot.

The motion for new trial raised the questions discussed in the opinion.

O'Neal & Son, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. All the evidence adduced in this case goes to show that the homicide was occasioned by and was

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the result of insulting and defamatory statements made by the deceased about the daughters of defendant. Defendant himself claimed that this was the sole cause and occasion of the killing, and, if any fact in the transaction is clearly established, it is that after being informed of the defamatory language appellant declared his intention to kill deceased, and having made his preparations to do so, started from home for the purpose of putting them into execution. On the first day when he was seeking deceased for that purpose, it is reasonably made to appear that he saw him, and under circumstances in which he might easily have made the effort, and perhaps have accomplished his vengeance; but he did not do so. On the following day he again went to the place of the homicide, for the avowed purpose of finding and killing the deceased, and there can be no question but that he provoked the altercation, if there was one, which immediately led to the killing.

Under these facts the homicide could not have been manslaughter, because he did not kill him when he first met him, or had an opportunity to kill after having been informed of the insult. (Penal Code, sub div. 4, arts. 597, 598; *Howard v. The State*, 23 Texas Ct. App., 265.) And again, not having killed on the first meeting and opportunity, the crime was not manslaughter, because the second meeting and contest was sought, brought about and provoked by defendant, with apparent intention and for the purpose of killing deceased. (Penal Code, art. 603; *Greene v. The State*, 12 Texas Ct. App., 445.)

With greater reason it may be asserted that there is not the slightest pretense of self defense legitimately raised by the facts; on the contrary, they clearly, if not absolutely, negative such defense. Such being the case, even if we concede proper diligence to obtain the absent testimony for which the continuance was sought to prove self defense, still we would be forced to hold, in the light of the indubitable facts established, that said testimony would not be probably true. We see no error in the ruling of the court upon the application, and the refusal of the new trial in so far as it was based upon it.

Serious complaint is made of the charge of the court. In our opinion it is a most able and lucid exposition of the law upon all the legitimate phases of the facts. No material reversible error has been presented on this appeal, wherefore the judgment is affirmed.

Opinion delivered October 22, 1887.

Statement of the case.

No. 2612.

A. E. PARKER v. THE STATE.

94	61
28	220
24	61
36	363

1. **MURDER—MANSLAUGHTER—PRACTICE—CASE STATED.**—The appellant in this case was separately indicted as an accomplice of one Melton in the murder of one Braden. He was convicted upon practically the same evidence, having interposed, as was done on the trial of Melton, the defense of manslaughter. *Held*, that the evidence does not raise the issue of manslaughter, in view of the proof that, though Miller killed Braden for the slander of his daughters, he did not do so upon his first meeting with Braden after being informed of the slanderous language.
2. **SAME—CONTINUANCE** to secure absent testimony is properly refused if, in view of the evidence on the trial, the absent testimony was not probably true, or, if not probably untrue, it was, in the light of the other evidence, immaterial to any issue in the case.
3. **SAME—EVIDENCE—PREDICATE.**—See the statement of the case for evidence *held* sufficient as a predicate for the admission of the written testimony of an absent witness.
4. **SAME—FACT CASE.**—See the statement of the case in this and in Melton's case, ante, page 47, for evidence *held* sufficient to support a conviction as accomplice to murder in the second degree.

APPEAL from the District Court of Cass. Tried below before the Hon. W. P. McLean.

The appellant in this case was indicted as the accomplice of J. T. Melton in the murder of one Thomas Braden, in Cass county, Texas, on the twenty-sixth day of April, 1887. His trial upon said indictment resulted in his conviction, and he was awarded a term of five years in the penitentiary. A full report of the evidence adduced upon the trial of Melton will be found in the present volume, commencing on page 47. Several of the witnesses who, on Melton's trial, testified to the circumstances immediately attending the homicidal act, testified upon this trial, and gave substantially the same accounts they did on the said trial of Melton. This report will therefore include only such testimony as was adduced in addition to that adduced on Melton's trial.

The ruling embodied in the third head note relates to the predicate upon which the written testimony of C. M. Anderson was introduced and read by the State. That predicate was based

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upon the testimony of Griff Culpepper, Tom Henderson and Hardy O'Neal.

Griff Culpepper testified, in substance, that he knew one Charley Anderson, who lived in Cass county, Texas, during the month of April, 1887, and who at that time was engaged in hauling lumber from Henderson & King's mills to the "Y" switch of the Texas & Pacific Railway. The witness did not know that the initials of that Anderson were "C. M.," but knew that he worked at Henderson & King's mills at the time that Braden was killed. Since the death of Braden, the said Anderson has removed from the State of Texas into the State of Arkansas. The witness knew as a matter of fact that the said Anderson was now in Hempstead county, Arkansas, because, a week before the trial, the witness, at the instance of Parson Harrison, went to the said Anderson's house, in said Hempstead county, Arkansas, to see said Anderson, and to induce him to attend this court and testify against this defendant. The witness saw the said Anderson, who told him that he had removed to and settled permanently in the said Hempstead county, Arkansas. He declined to attend this court, because, he said, that he testified upon the examining trial of this defendant, when his testimony was reduced to writing, and he had been informed that, having removed permanently from Texas, his said written testimony could be used in evidence. The witness was not present at the defendant's examining trial, and was not able to testify that the Charley Anderson he saw in Arkansas was the C. M. Anderson who testified on that examining trial.

Tom Henderson testified, in substance, that he was the senior partner of the firm of Henderson & King, proprietors of Henderson & King's mill, in Cass county, Texas. At the time that Braden was killed, a man named C. M. Anderson, who was generally called Charley Anderson, was in the witness's employ, his business being to haul lumber from the said mill to the "Y" switch on the railway. Witness had no other Anderson in his employ at that time. Witness was present at the examining trial of this defendant, and knew that C. M. Anderson, commonly called Charley Anderson, testified on that trial. Anderson left Cass county subsequent to the killing of Braden. Some time before he left, he said that he wanted to go to Kansas; but, on the day he left, he said that he was going to Arkansas.

Hardy O'Neal testified, in substance, that he was an attorney at law. He was present at the examining trial of the defendant,

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which took place before Justice of the Peace Duncan, on the fifteenth, sixteenth and seventeenth days of May, 1887. Witness appeared before that court as special counsel for the prosecution. C. M. Anderson was placed upon the stand and testified for the State, and was cross examined by the counsel for the defense. His testimony was reduced to writing, was read over to him, and was then adopted and signed by the said C. M. Anderson. Witness identified the writing in evidence as the testimony of the said Anderson. He recognized the certificate of authentication which he wrote himself, and which Judge Duncan signed.

The trial court held the predicate thus laid to be sufficient, and the State read in evidence the written testimony of C. M. Anderson, as follows: "I knew Thomas Braden, who is now dead. He died on April 26 or 27, 1887. He was killed by being shot in the leg. He was shot by Mr. Thomas Melton with a shot gun. He lived about three hours. The shooting occurred in Cass county, Texas, between nine and ten o'clock on the morning of April 26 or 27, 1887. Mr. Braden was unloading his wagon. Mr. Tom Melton came up within thirty-three steps and got off his wagon and advanced on Braden, advancing twenty-three steps. He advanced with his gun cocked, but not up to his shoulder, cursing at the same time. I did not understand anything he said, except that he told Braden that he had been scandalizing his daughter. Braden remarked that they would go down to where the other men were and settle it. Mr. Melton replied that they would settle it right there. He then ordered Braden to halt, and at the same time fired. Mr. Braden was then going around his wagon toward where the men were. When Melton said they would settle it right there, he turned toward Braden, and they were walking toward each other when Melton fired. At the time when they were walking toward each other the manner of Braden was not that of a man who was angry. At the time the gun was fired Braden was not doing anything, except that he was walking toward Melton, who was walking toward him. Braden, when shot, had nothing in his hands, nor was he making any demonstrations against Melton. Melton fired with a double barreled shot gun, the shot taking effect in Braden's right leg. I was then about twenty-five steps from the parties. I ran to them at once. The blood was then pouring from Braden's leg, and I thought when I got his shoes off that he must have shed at least a bucketful. When the shot was fired Braden ran up to Melton and threw him down. When I

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got to them Braden was doing nothing but holding the gun down and laughing. Melton was lying on the ground under Braden, but was making no effort to hurt Braden. He said nothing except to call for some one to take Braden off him. After he got up, Melton got his gun, mounted his wagon and went off. Braden was placed on a blanket and taken to Mr. McDuff's. He never stood on his feet after he threw Melton down. I did not see any arms of any kind about Braden. Melton did not call Braden to come to him.

"I saw Melton the day before the shooting about one mile from the "Y" switch. He asked me if I had seen the mule teams. I told him that I supposed they had gone back on the other road and by that time had reached the mill. Melton then turned and went back towards the mill. I saw Will Taylor and A. E. Parker about half a mile from the mills on Monday, the day before the killing. Taylor asked me where Tom Braden was, and I told him that I supposed Braden was at the mill. Taylor was driving, and Parker was lying in the wagon. They were then going to the "Y." Parker said nothing on this occasion, and Taylor made no threats. Braden at that time was hauling lumber for Henderson & King, and traveled from the mill to the "Y" every day. A double barreled shot gun was lying in the wagon of Taylor and Parker. The wagon belonged to Taylor and was loaded with lumber. Witness was then working at the mill, and knew that previous to that time Parker had not been engaged with Taylor in the business of hauling lumber. I never, previous to this or any other time, heard either Parker, Melton or Taylor say anything about Braden. When Melton fired the fatal shot, he and Braden were between eight and ten feet apart. When Melton got up from under Braden, I noticed that he had a small skinned place over one eye. I don't know how he came by it. I did not see Braden strike Melton, and I know that he did not strike nor attempt to strike Melton before the fatal shot was fired. I do not know how Braden was holding his hands when the shot was fired, but I know that he did not then have anything in his hands. After Braden got off Melton, Melton got up and apologized to Braden for shooting him."

Cross-examined, the witness, Henderson, said: "I live at the Temple mills in Cass county, Texas. Melton had come in and unloaded his ties, and had started out from the "Y" and on the road leading out from the "Y," and was between sixty and seventy yards from Braden when he stopped his wagon, got out and

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started towards Braden. He had gone but few steps in that direction when Braden started towards him. When Melton started towards Braden, I heard him talking to and cursing Braden, but understood nothing except his charge that Braden had been scandalizing his daughters. Melton had advanced thirty-three steps, and Braden about the same distance when the fatal shot was fired. Melton told Braden to stop before he fired, which Braden did not do. At the time that the shot was fired, Melton was standing between two cross ties, and Braden was advancing upon him. Melton and Braden met about half way between the points from which they respectively started towards each other. Melton had walked towards Braden exactly ten steps when he cocked his gun, and then walked twenty-three more steps and fired. I could not tell exactly what Braden was doing at the moment that Melton cocked his gun. He was then half hidden from me by a lumber pile. Melton had the gun up to his shoulder and face when he fired upon Braden. He fired but one shot. Melton did not advance upon Braden after firing the fatal shot. Braden advanced upon, seized and threw Melton to the ground. Braden looked to be twenty-five or twenty-six years old, and to weigh anything from one hundred and fifty to one hundred and seventy pounds. Melton appeared to be about forty years old, and to weigh from one hundred and thirty-five to one hundred and forty pounds. Witness did not hear Melton say, after the shooting, that the shooting was accidental. He merely remarked that he begged Braden's pardon."

On his redirect examination, the witness said: "Hardly an instant of time elapsed between Melton's order to Braden to halt and the report of a gun. I do not think a man walking could have obeyed the order before the firing of the shot. Melton and Braden were between ten and twenty steps apart when the latter got from behind the lumber pile. Braden did not then have anything in his hands, nor did he have his hands in his pants pockets. Braden did not use profane language during the difficulty, nor did he say anything indicating anger or a purpose on his part to assault Melton."

In his testimony for the State, Dick Parker gave very much the same account of the difficulty between defendant and Will Taylor on one side and Braden on the other, on the lumber road on Monday morning that Will Taylor gave in his testimony on the Melton trial, adding that, when defendant denounced Braden for his remarks, he drew and opened his knife, and in company

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with Taylor, advanced upon Braden. Braden then turned to walk off, when Taylor caught him by the collar of his shirt. Braden pulled loose and fled. Taylor followed and made as many as three strokes at him with his knife.

Mrs. Pilen testified, for the State, that she saw defendant and one of Melton's daughters at Jackson's party a short time before the killing of Braden. They were in a side room, Miss Melton sitting on a chair and defendant on a table. Defendant was swinging his legs, and would sometimes strike Miss Melton's skirts with his feet.

William Scott testified, for the State, that he was an attorney at law, and defended the defendant on the examining trial. That trial resulted in the refusal of bail to Melton and the exaction of bonds from defendant and Taylor. This result produced such an effect upon the defendant that he began to weep as soon as the ruling of the court was made. Will Taylor then approached him and said: "What are you crying about? There is not a living man who can swear anything against you. You are in no danger."

Deputy Sheriff Maxcy testified, for the State, that, after his arrest and confinement in jail, the defendant sent for the district attorney and had a conversation with him.

Hardy O'Neal testified, for the State, that after the examining trial of Melton, defendant and Taylor, the two latter separately proposed to turn State's evidence against the other two if the prosecutions against themselves would be dismissed. Witness replied to each that he was merely employed to assist the county attorney, and had no authority to make such an agreement, but promised each to submit the propositions to the county attorney. If there was a written agreement between Taylor and the county attorney, accepting Taylor's proposition to turn State's evidence, the witness did not know it. Taylor proposed to the district attorney to testify against Melton and this defendant, if the district attorney would dismiss the prosecutions against him. The district attorney accepted Taylor's proposition, telling him he wanted nothing but the truth.

H. Crain testified, for the defense, that he lived in Cass county, Texas, about a half a mile from the "Y" switch referred to by the several witnesses in this case. Defendant came to witness's house with the witness's son, Jesse Crain, on the night of Sunday, the second day before the homicide. On Monday morning, witness hired the said defendant to work for him. Defendant

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did not begin work on that day, but went off to get his clothes and to return a gun he had borrowed. He came back and stayed that night at the witness's house. Previous to this the defendant had been working for J. T. Melton. Between six and seven o'clock on the morning of the day of the homicide, the witness left the defendant in his field preparing to go to work, and went himself to his shop, a half mile distant, to work. That shop was about half way between the witness's house and the "Y" switch. Between nine and ten o'clock, defendant came to the shop and told witness that Melton, who was the witness's brother-in-law, had shot Braden. The point in the field where witness left defendant on that morning was a little more than a half mile from the "Y" switch where Braden was killed.

Jesse Crain, the son of the last witness, testified, for the defense, that the defendant came to his father's house on the night before the killing, bringing with him a valise and a fiddle. The witness left him at his father's house between eight and nine o'clock on the next morning, preparing to go to work.

H. F. O'Neal testified, for the defense, that he was one of the counsel for the defense, on this trial, and defended him on the examining trial. He remembered that when the examining court announced the ruling, binding the defendant over to the grand jury, the defendant broke down and fell to weeping. Taylor approached him and made the statements to him testified to by the witness W. T. Scott, and in addition, said to him: "If you were guilty, I would know it."

The appellant's motion for a continuance, the ruling upon which forms the subject matter of the second head note of this report, sets out that by some of the absent witnesses the appellant expected to prove the statements of the deceased connecting him disgracefully with the daughters of Melton, and that by other absent witnesses he expected to prove that, on the Friday preceding the killing of Braden by Melton, he borrowed the gun with which he was afterward seen by some of the witnesses, to go wolf hunting, and that he did go wolf hunting with the said gun on Saturday, the fourth day preceding the homicide.

The motion for new trial raised the questions discussed in the opinion.

O'Neal & Son, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

Opinion of the court.

WHITE, PRESIDING JUDGE. This is a companion case to that of J. T. Melton, just decided. In this case, however, appellant was only indicted as an accomplice of Melton's in the murder of Thomas Braden; that is, he was indicted as one who, though not present at the commission of the offense, before the act was done advised, commanded and encouraged the said J. T. Melton to commit it. (Penal Code, art. 79.)

When the case against the principal, Melton, in a separate indictment, was called for trial, the defendant made the affidavit prescribed by article 669a, added to the Code of Procedure by act of the Twentieth Legislature, page 33, approved March 21, 1887, to the effect that when two or more defendants are prosecuted for an offense growing out of the same transaction, by separate indictments, either defendant may file his affidavit in writing that one or more parties are so indicted whose evidence is material to his defense, etc., and praying that they be first tried, etc., and he asked that this appellant be first tried in this case. This prayer was granted, appellant was tried, and his trial resulted in his conviction of murder in the second degree, with punishment affixed at five years in the penitentiary. On this appeal he submits several propositions for the reversal of the judgment.

We have already shown, in the Melton case, that the homicide was not manslaughter under the facts developed, and that the issue of self defense was not raised. In this case the facts are almost identical, except that they go further in this case, and positively eliminate self defense by showing in the testimony of the witness, Harris, a statement made by Melton just after the shooting, to the effect that he, Melton, did the shooting because the deceased had slandered his daughters. There was no claim that Melton acted in self defense, pretended by him at that time.

In so far as defendant's application for continuance is concerned, if it be admitted that due diligence and the probable truth of the testimony are shown, still the facts sought to be proven by the witnesses Hill and Culpepper, as to defamatory language used by deceased about Melton's daughters, ceased to be material when the other evidence showed that Melton did not kill deceased upon the first meeting after having heard of the insults. Moreover, it is abundantly proven by other testimony adduced that deceased did use most defamatory language about Melton's daughters. In so far as these witnesses were concerned, no injury appears from the refusal of the contin-

Syllabus.

uance nor the overruling of the motion for new trial. As to the proposed testimony of Mrs. Parker, about this defendant's borrowing from her the gun of her husband to go wolf hunting, this testimony is also immaterial in the light of an abundance of other testimony, besides defendant's having and borrowing the gun; which establishes the charge against him, viz., that he advised, commanded and encouraged Melton in the commission of the crime. There was no error in overruling the motion for new trial, in so far as it involved the application for continuance.

Objection was made to the introduction, by the State, of the testimony of Charles Anderson, taken and reduced to writing on the examining trial, because, it is insisted, that no sufficient predicate was laid as to his being a non-resident and beyond the jurisdiction of the State. To our minds the evidence is reasonably certain, if not wholly conclusive, both as to his identity and that said witness had removed from the State of Texas and become a citizen of Arkansas. (*Conner v. The State*, 23 Texas Ct. App., 378, and authorities cited.)

Though attacked in several particulars, we have been unable to see any error of the slightest moment in the charge of the court. It presents the law fully, fairly and ably. No sufficient reason is made manifest why the judgment of the lower court in this case should be disturbed, and it is therefore affirmed.

Affirmed.

Opinion delivered October 22, 1887.

24	69
31	250
31	361

No. 2641.

TOM WILLIAMS v. THE STATE.

1. **BURGLARY—INDICTMENT.**—The conviction in this case was for burglary. It was had under an indictment which charged conjointly the offense of burglary and theft. The allegations were that defendant did burglariously enter the house with the intent to commit theft, and that he did commit theft of certain personal property. The indictment proceeded to allege, not the elements of the theft which it charged he *intended* to commit, but the elements of the theft which he *did* commit. The contention of the appellant is that the indictment is insufficient to support the conviction for burglary, because it failed to allege the elements of the *intended* theft. *Held*, that, alleging the elements of the theft

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actually committed, the indictment is sufficient to support the conviction for burglary. See the statement of the case for the indictment in *extenso*.

2. **SAME.**—If the purpose of the pleader had been merely to charge a burglary with intent to commit an offense, and not to charge burglary and the actual commission of the offense, then the indictment would be insufficient unless it alleged the elements of the intended offense.
8. **SAME.**—The rule is, that if burglary and theft be charged in the same count, and the party charged be convicted, the theft will be included in the burglary, and no judgment can be rendered for the theft. In such case, however, the conviction for burglary will bar a subsequent prosecution for the theft.

APPEAL from the District Court of Fannin. Tried below before the Hon. D. H. Scott.

A term of two years in the penitentiary was assessed against the appellant upon his conviction for burglary, under an indictment the charging part of which reads as follows:

* * * "That Tom Williams, on or about the first day of July, in the year of our Lord, 1887, in the county of Fannin and State of Texas, did then and there unlawfully, in the day time, by force and fraud, break and enter a house there situate, and occupied and used by Jake Williamson, without the consent of the said Jake Williamson, with the intent to commit theft; and the said Tom Williams did then and there fraudulently take from said house, and from the possession of the said Jake Williamson, one pair of pants of the value of one dollar, the same being the corporeal personal property of the said Jake Williamson, without the consent of the said Jake Williamson, and with intent to deprive the said Jake Williamson of the value thereof, and to appropriate the same to the use and benefit of him, the said Tom Williams. And the grand jury aforesaid do further say that at the county, State and place aforesaid, and on the first day of July, 1887, at night, the said Tom Williams did, by force and fraud, break and enter said house, occupied and situate as aforesaid, with the intent to commit theft; and the said Tom Williams did then and there fraudulently take from said house, and from the possession of the said Jake Williamson, one pair of pants, of the value of one dollar, the same being the corporeal personal property of the said Jake Williamson, without the consent of the said Jake Williamson, and with the intent to deprive the said Jake Williamson, of the value thereof, and to appropriate the same to the use and benefit of him, the said Tom Williams; contrary," etc.

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Jake Williamson was the first witness for the State. He testified that he lived in a house situated in Bonham, Fannin county, Texas. No one but the witness occupied that house in July, 1887. Some time during that month a pair of pants belonging to the witness were taken from that house without the consent of the witness. When taken they were in a box inside of the house. Witness placed them in a box on a Friday, and missed them on Saturday—the next day—and found them at the house of Dick Stewart, where the defendant then lived, on the following Monday. When he missed his pants on Saturday the witness discovered that the latch on his door had been pried so that it would not catch and fasten. He closed, latched and fastened his door on Friday night, and again on Saturday morning when he left his house. On his return on Saturday he found the latch pried as stated, and missed his pants. Until a month previous to this, the defendant lived with witness, and was authorized to enter the house at will, but had no authority to do so after he left and went to Stewart's. His clothes were still at the witness's house.

Tom Stephens testified, for the State, that he and the defendant lived at Dick Stewart's house in July, 1887. On the Saturday night after Williamson lost his pants the witness saw the defendant wearing a pair of dark blue pants. They were the same pants identified on the examining trial by Williamson as the pants that were taken from his house. The defendant told witness that he bought those pants at the second hand store for one dollar and a quarter. When Dick Stewart's house was searched, the pants were found in the yard under a water barrel.

Other witnesses for the State testified that they were present when the premises of Stewart were searched for the pants, and that they saw Bob Willis turn over a water barrel in the yard and find the pants which were afterwards, at the examining trial of the defendant, identified and claimed by Jake Williamson.

The motion for new trial, and the motion in arrest of judgment, raised the question discussed in the opinion.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. This prosecution was for burglary and theft, and the indictment contained two counts, one for a burglary and theft in the day time, and one for burglary and theft at night. The defendant was convicted and adjudged

Opinion of the court.

guilty of burglary, and the only question arising upon the record is as to the sufficiency of the indictment as a charge for burglary.

It will be noted that the counts are not for burglary alone, but each one charges conjointly a burglary and theft. In substance and effect, the charge is that defendant entered the house to commit theft, and, whilst it does not give in that connection the elements of the theft he intended committing, it does charge all the elements of the theft he actually committed, and connects in one sentence, by the conjunction "and," the intent with the act, which act is fully described in the statutory words used to define theft. The pleader has followed form 461, Willson's Criminal Forms, page 200. It is not burglary with intent to commit theft alone which was the crime intended to be charged. In such case, form 460, Id., should have been followed, and in such case, where the offense intended and not its actual commission is the object, the intended offense must also be charged with all its ingredients.

Not so when the actual commission is charged in the same count after the unlawful entry. It would be a useless tautology to require the pleader to allege in the same count the statutory ingredients of the intended crime, and then repeat those same ingredients again in the crime into which the intent is consummated and merged. If you aver that A intended to commit theft, and then state particularly the accomplished acts of his which constitute the statutory definition of theft, is not A as fully put upon his notice of the intended crime as he is of the crime committed? We think so. The fact that the same count may charge two offenses, and that the party might have been convicted for either burglary or theft (Penal Code, art. 712), is no argument that the count is insufficient for burglary; because, where the two offenses are charged in the same count, the rule is that on conviction the theft would be included in the burglary, and no judgment could be rendered for the theft. In such case the conviction for burglary would bar a subsequent prosecution for theft. (Miller v. The State, 16 Texas Ct. App., 417; Howard v. The State, 8 Texas Ct. App., 447; Black v. The State, 18 Texas Ct. App., 124; Smith v. The State, 22 Texas Ct. App., 350.)

Believing that each count was sufficient to charge burglary, the crime for which appellant has been convicted, and having found no error in the record, the judgment is affirmed.

Opinion delivered October 22, 1887.

Affirmed.

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No. 2461.

JOHN BENNETT v. THE STATE.

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1. **PRACTICE—IMPEACHMENT OF WITNESSES.**—Article 755 of the Code of Criminal Procedure provides that “the rule that the party introducing a witness shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any other manner except by proving the bad character of the witness.” *Held*, that before this rule can be applied, the witness must have stated some fact in evidence which was injurious to the cause of the party in whose behalf he was called to testify; and it is not enough that he merely made a statement different from that which the party had reason to and did believe he would make. See the opinion for a state of case to which the rule does not apply.
2. **SAME—SURPRISE.**—The rule obtains in this State that if a party be bona fide surprised at unexpected testimony of his witness, he may be permitted to interrogate his witness as to his previous declarations inconsistent with his testimony,—the object being to test the witness’s recollection, and to enable him, if mistaken, to review his evidence. Such corrective testimony is also admissible to explain the attitude of the party calling the witness; but if the sole object of the proffered testimony be to discredit the witness, it will not be received. See this case in illustration.
3. **SAME—CREDIBILITY OF A WITNESS—PRIVILEGE OF COUNSEL.**—While a full pardon, granted by competent authority, to one who has been convicted of felony, removes the legal odium from such person, and qualifies him to testify as a witness in the courts of this State, it does not remove the question of his credibility from the consideration of the jury; nor will it operate to prevent opposing counsel from urging in argument that, notwithstanding such pardon, the witness, by reason of his conviction for felony, is entitled to no credit. The trial court did not err in refusing to restrain the State’s counsel in such argument.

APPEAL from the District Court of Johnson. Tried below before the Hon. J. M. Hall.

The conviction in this case was for the theft of one head of cattle, the property of Thomas Sparks, in Johnson county, Texas, on the sixteenth day of March, 1885. The penalty assessed against the appellant was a term of two years in the penitentiary.

Thomas Sparks was the first witness for the State. He testified, in substance, that he lived about twelve miles south of Cleburne, in Johnson county, Texas, and lived there in March,

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1885. His certain unmarked yearling, the same described in the indictment in this case, ran on the range, near witness's house, during the spring of that year. On or about the day alleged in the indictment the witness saw the said yearling on the said range. It had then been recently branded with the device of a spur, which was the defendant's brand. A few days after that discovery the witness was accosted by the defendant, who said: "I understand that one of your yearlings has my mark and brand on it." Witness replied that he was correctly informed, and defendant said: "Well, then, you have got us." Witness then asked him what he meant, and he replied: "That is the first yearling I ever put the spur brand on, but I want you to understand that I did not steal it. I bought it from Henry Goodspeed, but I don't want you to say anything about it." Witness replied to this that he intended to enforce the law against the defendant. Defendant replied: "That is all right; but I want you to hold up until I get my money out of Goodspeed. If he hears of it he will run off, and I will not get my money back." Witness did not consent that defendant should take, or mark, or brand the said yearling.

Cross examined: The witness testified that, in the course of the conversation recited, the defendant said that when he bought the yearling from Goodspeed he did not know that it belonged to the witness, and that he thought Goodspeed owned it and was conveying a good title.

Henry Grafa was the next witness for the State. He testified that, between the tenth and fifteenth days of March, 1885, the defendant came to his house, introduced himself, and asked if witness wanted to buy any steers, adding that he had two for sale. Witness replied that he did not want to purchase any steers. He then asked if witness had seen any stray yearlings in the country. The witness replied that there was then a stray yearling in his pasture. Witness and defendant then went to the pasture, and witness showed defendant the yearling described in the indictment. The defendant claimed the yearling as his property, and drove it off. He said that his brand was HL connected, but that he thought of starting the spur brand. Three or four weeks later, the witness went to Thomas Sparks's house and picked out from several the yearling described in the indictment as, and which was, the same yearling defendant drove from his place.

Cross examined: The witness stated that Mr. Robert Barry was

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the owner of the pasture from which the yearling was taken by the defendant. When he claimed and took the yearling, the defendant did not say anything about having purchased it from anybody. Witness had so far interested himself in the prosecution of this case as to subscribe five dollars towards the fee for the employment of special prosecuting counsel. Witness denied that he had ever attempted to get the Kyle boys to give evidence on this trial different from that they gave before the grand jury, or that he had ever threatened to procure their indictment for perjury if they testified on this trial as they did before the grand jury.

Henry Goodspeed testified, for the State, that he lived near the defendant's house in 1885. He emphatically denied that he ever, at any time, sold or traded this or any other yearling to the defendant. Shortly after his arrest on this charge, the defendant appealed to witness to testify that he sold the said yearling to defendant. Just before this case was called for trial, the defendant appealed to witness to testify in his behalf.

On his cross examination, the witness stated that he was on his father's place on or about March 20, 1885, when officers Coulter and Stewart visited that place. He was about a half mile distant when he saw the officers going towards his father's house. As he supposed a warrant had been issued against him for the theft of this yearling, it occurred to him that the said officers were seeking to make his arrest. When the officers rode towards him, the witness turned his horse and started off. The officers increased the speed of their horses, which, being observed by the witness's horse, the latter animal struck a run and distanced the officers. Witness went to a neighbor's house, sent his horse home, and then made his way to Fannin county, where he was arrested three weeks later. Witness fled the country, not because he was guilty, but because he wanted to ascertain if he could make bond before submitting to arrest.

Hardy Kyle was next introduced by the State. He testified that he had never heard the defendant say anything about the Sparks yearling. He denied that the defendant offered to pay him to testify on his behalf before the grand jury that he bought the yearling from Henry Goodspeed. He further denied that he ever told Captain English, special prosecuting counsel, that he, witness, was so drunk when he was taken before the grand jury that he did not know what he testified. On his cross examination he testified that he was at the house of defendant's father on

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a certain day in March, 1885, when a man, a stranger to him, but who, in general appearance, resembled Henry Goodspeed, came to the yard fence driving a yearling answering to the description of that described in the indictment. Defendant joined that man at the fence and bought the yearling, paying five dollars for it. That yearling was then unmarked and unbranded.

Captain J. N. English testified, for the State, that during the preceding term of the court the witness Hardy Kyle told him that defendant tried to hire him to go before the grand jury, and to appear in this court and testify in his behalf. He also told witness that he was so drunk when he was before the grand jury that he did not know what he swore to.

Several State witnesses testified that the defendant had long been familiar with the range, was an experienced stockman, and ought to have known Sparks's cattle in March, 1885.

The State closed.

— Kyle testified, for the defense, that he, in company with his brother, Hardy Kyle, was present at defendant's father's house in March, 1885, and saw the defendant buy a certain red heifer yearling from a man whom he thought, but was not certain, was Henry Goodspeed. Defendant paid five dollars for the animal.

Under the circumstances stated in the opinion, Richard Bennett, the father of the defendant, testified, in substance, that in March, 1885, he saw Henry Goodspeed drive a yearling to his house and enter into a conversation with defendant and the two Kyle boys. Presently the yearling was turned into the lot, when defendant came to the house and said that he had bought the animal from Goodspeed. The animal was then unmarked and unbranded. The animal escaped from the lot and was gone for several days. It was again penned by defendant, and put in his mark and brand. Subsequently it was claimed by Sparks. The witness then saw Goodspeed about the matter, and asked him what he meant by the transaction. Goodspeed merely replied that defendant could have got along very well without involving him in the trouble.

Deputy sheriffs Coulter and Stewart testified, for the defense, that they undertook to arrest Henry Goodspeed for this theft, in March, 1885. They chased him about six miles, into the brush of Noland's creek, when he abandoned his horse and escaped, the horse being captured by the witnesses. Subsequent to the arrest of defendant, Henry Goodspeed surrendered.

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The defense closed.

Henry Goodspeed, recalled by the State, in rebuttal, testified that he and Hardy and George Kyle had been intimately acquainted for several years, and knew each other well in March, 1885. Witness admitted that early in 1885 he traded three head of cattle to the defendant for a saddle and five dollars. He did not, however, in March, 1885, or at any other time, drive the Sparks or any other yearling to Richard Bennett's house, and there trade it to defendant.

The motion for new trial raised the questions discussed in the opinion.

Poindexter & Padelford, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. By article 755, Code of Criminal Procedure, it is provided that "the rule that the party introducing a witness shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any other manner except by proving the bad character of the witness."

On application of this change in the rule to any particular case, the question is, did the witness state facts injurious to the party calling him as a witness? (*Tyler v. The State*, 13 Texas, Ct. App., 205; *Thomas v. The State*, 14 Texas, Ct. App., 70.) In other words, before the right accorded by the statute can be availed of, some statement must have been made by the witness injurious to the cause he was called to testify in behalf of. It is not sufficient that the witness makes a statement different from what the party calling him had reason to believe and did believe he would make, if the statement made is not injurious.

By the bill of exceptions in this case it is shown that the prosecution had placed one Hardy Kyle on the stand as a witness for the State, and on his direct examination he stated: "I never heard defendant say anything about the Sparks yearling." This is in full all the statement made by him. Does it appear that this statement was injurious to the State or any one else? If so, then any negative answer to a question propounded where an affirmative was desired, and vice versa, might be claimed to be injurious.

After the witness had so stated, over objection of defendant,

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the court permitted the prosecution, with avowed purpose, to first lay a predicate, and then introduce evidence to impeach its witness by proving that said witness had on another occasion stated to counsel for prosecution "that defendant had tried to hire him (witness) to go before the grand jury and testify for him in this case, and that he had offered to hire him to testify before the jury, and that he was so drunk when before the grand jury that he did not know what he then swore."

In our opinion, a proper and sufficient case in which the impeachment of one's own witness would be allowable is not established by the facts shown. A case of surprise at testimony other than that expected and calculated upon is perhaps shown. But there is a well defined difference in the rules with reference to surprise and impeachment. "A party bona fide surprised at the unexpected testimony of his witness may be permitted to interrogate the witness as to his previous declarations alleged to have been made by the latter, inconsistent with his testimony, the object being to probe the witness's recollection and lead him, if mistaken, to review what he has said. Such corrective testimony is also receivable to explain the attitude of the party calling the witness. But when the sole object of the testimony so offered is to discredit the witness, it will not be received." (*White v. The State*, 10 Texas Ct. App., 381, quoting from 1 Wharton's Ev., sec. 549.)

The ruling complained of was erroneous, and it can be readily imagined how the testimony admitted to impeach the State's witness, Kyle, even had it been pertinent to the issue raised, which is not made apparent, was most prejudicial to the rights of this appellant.

Before finally disposing of the case it may be well to consider the third bill of exceptions, which, in so far as we are advised, submits a question never heretofore adjudicated in this State. When defendant called his father, Richard Bennett, as a witness, he was objected to by the State, because of incompetency, in that he had been convicted and incarcerated in the penitentiary for a felony. (Penal Code, art. 730, subdiv. 5.) To this the defendant replied that the witness had been legally pardoned for said offense, and produced the Governor's full charter of pardon. The objection was properly overruled, and the witness testified. Afterward, in argument to the jury, when counsel for the prosecution were insisting that, notwithstanding the pardon, the witness was entitled to no credit on account of his former

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conviction, defendant objected to such line of argument as illegal and unwarranted, and asked the interposition of the court to arrest and prevent it. This the court declined to do, and in his explanation to the bill of exceptions the learned judge says: "If the witness had been convicted of a felony and pardoned, it went to his credibility as a witness, and the jury had a right to know the character of the witness before them, and the attorney had the right to comment upon the credibility of the witness."

With regard to the general effect of a pardon, the accepted doctrine is that a full pardon absolves the party from all legal consequences of his crime; it makes the offender a new man; it blots out his offense and gives him a new credit and capacity, and even so far extinguishes his guilt as that, in the eye of the law, the offender is as innocent as if he had never committed the offense. (*Hunnicut v. The State*, 18 Texas Ct. App., 199; *Carr v. The State*, 19 Texas Ct. App., 635, and authorities collated and cited.) Notwithstanding this comprehensive doctrine, it seems equally well settled that, whenever the pardoned convict is presented as a witness, the judgment of his conviction may be put in evidence against him. Mr. Wharton says: "But a pardon does not preclude such conviction from being put in evidence," and in support of his text he cites in the note a long array of authorities of the highest standing. (Wharton's *Crim. Ev.*, 8 ed., sec. 489, taken from the opinion in *Curtis v. Cochran*, 50 N. H., 244.) In that opinion it is said: "A pardon is not presumed to be granted on the ground of innocence or total reformation. (Citing authorities.) It removes the disability, but does not change the common law principle that the conviction of an infamous offense is evidence of bad character for truth. The general character of a person for truth, bad enough to destroy his competency as a witness, must be bad enough to affect his credibility when his competency is restored by the executive or legislative branch of the government." Mr. Greenleaf seems to think that a pardoned felon who has served his full term in the penitentiary "would be entitled to very little credit." (1 *Greenl. Ev.*, 13 ed., sec. 377.)

Mr. Starkie says: "And although a pardon can not convert a wicked man into an honest one, and confer credibility upon one who through the infamy of his conduct is not credible, yet such a pardon must be presumed to have been conferred after inquiry, upon good and sufficient ground, on an object worthy of the

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indulgence, and therefore worthy of being heard, but the degree of credit is still to be left to the jury." (1 Starkie's Ev., 7 Am. ed., p. 99.)

It was held in *Baum v. Clanse*, 5 Hill, New York, 196, that "though the pardon of one convicted of felony will in general restore his competency as a witness, yet the conviction may still be used to affect his credit."

In the light of these authorities the action of the court in the premises, complained of in the third bill of exceptions, was not erroneous. Other errors presented will not be noticed, because they may not arise on another trial. Because of the error in the first matter discussed, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

Opinion delivered October 22, 1887.

No. 2644.

ROBERT GENTRY v. THE STATE.

1. **PRACTICE—CONFESSION.**—To render a confession inadmissible upon the ground that it was induced by the promise of some benefit to the accused, such promise must be positive, and must be made or sanctioned by some one in authority, and be of such character as would be likely to influence the accused to speak untruthfully. The confession of an accused is not rendered inadmissible because it was made under the influence alone of fear of legal punishment.
2. **SAME—CHARGE OF THE COURT.**—The trial court in this case submitted to the jury the competency of the confession as evidence, and in the same connection charged them that it could be considered as evidence if the accused made statements therein relating to the commission of the offense which were otherwise found to be true. *Held*, that the charge was erroneous, because unauthorized by any evidence in the case; and that the error, though immaterial, necessitates the reversal of the judgment, inasmuch as exception was reserved at the time of the trial. (Code Crim. Proc., art. 685.)

APPEAL from the District Court of Fannin. Tried below before the Hon. D. H. Scott.

The conviction in this case was for the theft of fifteen dollars

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and twenty-five cents in money, two promissory notes aggregating the sum of three hundred and nineteen dollars and eighteen cents, and a receipt for one hundred dollars, the property of J. H. Morrow, and the penalty assessed was a term of two years in the penitentiary.

Doctor J. H. Morrow was the first witness for the State. He testified, in substance, that he lived near the town of Nobility, in Fannin county, Texas. He went to that town on the twenty-seventh day of May, 1887, and stopped at the store of Mr. George Holcomb. Witness did not then know the defendant. On the day named, and in the store mentioned, witness took out his pocket book containing the written instruments described in the indictment and two ten dollar currency bills. He had one of those bills changed, receiving therefor one five dollar bill and five dollars in silver change. The five dollar bill and a twenty-five cent silver piece the witness placed back in his pocket book, which still contained the notes and receipt. He then laid his pocket book on the counter. Four dollars and seventy-five cents of the silver he placed in an envelope, which envelope he placed in his day book, and then put his day book in his pocket. About that time Mr. Howard came into the store, and requested the witness to fulfill a previous promise to cut his hair. The witness went into the rear room with Howard, forgetting and leaving on the counter the pocket book containing the notes, receipt and fifteen dollars and twenty-five cents. Witness finished cutting Howard's hair in about fifteen minutes, and then thought of his pocket book. He immediately went to the counter where he had left it, but it was gone. The disappearance of the pocket book created some excitement among the several parties present, and a search of each person was suggested. The defendant was not then present. Every person in the house was then searched, but the missing property was not found. After this search was made, Mr. B. H. Austin said to witness: "Doctor, I knew you could not find the property on any of those you searched. Go over to Yates's store (across the way) and search there. There are parties there who were in this store, but who have not been searched." Witness then went to Yates's store, and the people present, including the defendant, were searched, but the property was not found. Meanwhile witness was told that a boy was seen to go around Yates's store, and the search was continued until the book and all of its contents were found under the store by Ennis Sims and handed the witness.

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Some time after the recovery of the property, and while witness was sitting on a wood pile near Yates's store, the defendant approached him, and, in a blustering manner, said: "Doctor, I understand you accuse me of getting your book?" The witness replied: "Young man, you are approaching me in a wrong manner." Defendant then said: "I don't want you to think I got your property." He then hung his head, began weeping, and repeated his declaration that he did not get the book. The witness then told the defendant that he had as well confess to the taking of the book and contents, or that he, witness, would prove it on him. Defendant then asked if witness had not found his book, and upon witness replying that he had, he asked why witness was "cutting up." Witness then said to him: "If you do not confess I will prove it on you." The defendant then asked: "If I do confess, will it go any lighter with me?" Witness replied that he did not know, but thought it would. The defendant then said that neither he nor his father had any money to spend on the matter, and offered to pay witness fifteen dollars to drop it. Witness replied that he did not want the defendant's money, and desired only that he should confess, and save him, witness, the task of going before the magistrate and proving his guilt. Defendant then asked if witness would prosecute him if he confessed, and witness replied that he would not volunteer to do so, but would have to do so if called upon by competent authority. About this time B. H. Austin came up and said to defendant: "You took that book off the counter when I went into the store after oil, and while Mr. Holcomb was drawing it." Defendant replied: "Yes, I got it then; but I did not hide it at the time they say I did, but at another time." All this occurred in Fannin county, Texas.

Cross examined, the witness stated that he did not see the defendant in Holcomb's store, nor did he know that defendant was searched at that store. He did not know that the defendant ever saw the pocket book before the theft. The defendant had no knowledge of the contents of the pocket book, unless he was present and saw witness when he opened it and took out the ten dollar bill to have changed. He could have seen the contents of the book, if present at that time.

At this point the witness was asked if he did not, after the recovery of the book, tell the defendant that, if he did not confess to the theft of the property, he, witness, who knew him to be guilty, would go before the magistrate, and prosecute him?

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Witness replied that he told the defendant to tell the truth about the matter, or he would be prosecuted, and that he, witness, knew that he, defendant, took the book. The defendant replied that he did not want to confess to a lie; to which the witness replied that he wanted the confession of the truth and not a lie. Defendant then said that he did not hide the book when they said he did, but at another time. The witness was then asked if he did not, at his house, a few days after the loss and recovery of the book, tell Mr. Gentry, defendant's father, that he told the defendant, at the time of the confession, that if he did not confess to the taking of the book he would have him arrested. Witness answered that he did not use the word "arrested" on that occasion, but said that he would have the defendant prosecuted, or would prove the theft on him. Witness denied that he ever told Frank Lewis and John Fletcher, or either of them, that he threatened the defendant with arrest if he did not confess to the theft. Neither Lewis nor Fletcher was in the town of Nobility on the day of the theft. No one was present during the witness's conversation with defendant at the woodpile, except Mr. B. H. Austin, and he only a part of the time. At the conclusion of this witness's testimony, the State read in evidence the promissory notes and the receipt described in the indictment.

B. H. Austin was the next witness for the State. He testified that he stepped into Holcomb's store to get some oil, on the twenty-seventh day of May, 1887. He observed then that Doctor Morrow was in the back room cutting Mr. Howard's hair. The defendant was standing near the counter. While Holcomb was drawing oil for the witness, the witness saw the defendant walk down the counter, take up a pocket book from the counter, place it in his pocket and walk out of the store. The witness did not then know to whom the pocket book belonged. The witness was present when the first search of persons was made at Holcomb's store. The defendant was not then present. After that search was made, the witness told Morrow that he knew at first that it would not discover the book, and advised him to go over to Yates's store, and search parties there. That course was taken, but no book was found. Later on that evening, Ennis Sims found the book under Yates's store, where it had been thrown. Some time later the witness observed Morrow and defendant at the woodpile, talking. He joined them and said to defendant: "You got that book as you left the store when I went into it for oil." Defendant replied: "Yes, I got it then, but they are mis-

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taken about the time I hid it." Witness's reason for not telling before that he saw defendant take the book was that he had great regard for the feelings of the defendant's father, who was a good man, and had been kind to him, witness. Witness was a renter on the place of the defendant's father, and obtained his supplies upon the security furnished by him.

Cross examined, the witness said that he saw the defendant take the book, and knew at the time that it did not belong to the defendant. Witness heard Morrow making inquiries about the book, saw the searching of parties at both stores, and was searched himself, but said nothing about his knowledge of the facts until after the defendant was seen to go around Yates's store, and was accused of the theft.

S. J. Merrill testified, for the State, that he was in Nobility on the day of the alleged offense. Yates's store had a front and a rear door. Witness entered Yates's store at the back door. While he was at the door, cleaning his feet, the defendant passed out of that door hurriedly and turned around the house towards the place where the pocket book was subsequently found by Ennis Sims. Before the witness had finished scraping his feet, the defendant returned and re-entered the store at the said back door.

John Thompson testified, for the State, that he was in Nobility when Doctor Morrow lost his pocket book. He saw the defendant and a small boy pass rapidly out of Holcomb's store and go towards Yates's store. The small boy stopped in front of Yates's store, but the defendant passed into Yates's store at the front door, and almost immediately emerged at the back door, whence he passed around the house towards the place where the pocket-book was subsequently found. He then went back the way he came. At that time Merrill was standing at Yates's back door, cleaning his feet. Witness saw Sims afterwards, when he found the pocket book under Yates's store house.

George Holcomb, the proprietor of the store from whence the property was taken, testified, for the State, in substance, that he saw the defendant in his store when he, witness, left the main room for the back room, to draw some oil for B. H. Austin. Frank Lewis and John Fletcher were not in Nobility on that day.

Ennis Sims testified, for the State, in substance, that he was one of the parties who searched for Doctor Morrow's pocket book, and was the party who found it. He found it under Yates's

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store, at a point near the rear end. Some one, in the search, knocked off a plank, which ran lengthwise with the store on the ground, and, in looking under the house through the opening thus made, witness discovered the book.

The State closed.

M. Gentry, the defendant's father, testified, for the defense, that, on the day after the alleged theft, he went to the residence of Doctor Morrow and talked the matter over with him. In that conversation, Doctor Morrow said that the defendant confessed to the theft of the property; that he told defendant that, if he did not confess, that he would procure an officer, prosecute him, and prove him guilty of the theft.

The motion for new trial raised the questions discussed in the opinion.

Taylor & Gallaway, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. I. To render a confession inadmissible upon the ground that it was induced by the promise of some benefit to the accused, such promise must be positive, and must be made or sanctioned by a person in authority, and must be of such character as would be likely to influence the accused to speak untruthfully. (*Rice v. The State*, 22 Texas Ct. App., 654.) And so, if the confession was made under the influence of fear of legal punishment, such fear of itself does not render the confession inadmissible. (*Thompson v. The State*, 19 Texas Ct. App., 593.)

In the case before us the confession of the defendant was evidently not the result of any promise of benefit to the accused. No promise whatever was made to him by any one. It appears from the evidence that the confession was made under the influence alone of the fear of legal punishment. No other influence is shown to have been operating upon defendant's mind to induce him to make a confession of guilt. Such being the case, we are of the opinion that the court did not err in admitting the confession in evidence.

II. But, whilst the confession was properly admitted in evidence, the court in its charge submitted to the jury, in effect, the question of its competency as evidence, and in doing so instructed that such confession should be considered as evidence if the defendant therein had made statements that were other-

Syllabus.

wise found to be true, with relation to the commission of the offense. This portion of the charge was promptly excepted to upon the ground that there was no evidence to warrant it, and said exception is here presented by proper bill. We are of the opinion that the exception must be sustained. After a careful examination of the evidence before us, we do not find a particle of testimony even tending to show that any material, or even immaterial, fact connected with the theft was discovered in consequence of the information obtained from the defendant's confession. (Nolen v. The State, 14 Texas Ct. App., 474.) This error in the charge having been excepted to at the time of the trial, we must set aside the conviction, notwithstanding such error is, in our opinion, in view of the evidence, immaterial, and could not have injured the rights of the defendant.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered October 26, 1887.

24	86
29	616
24	86
30	158

24	86
34	13
34	340
34	369

24	86
36	306

No. 2566.

BUD McADAMS v. THE STATE.

1. CONTINUANCE—NEW TRIAL.—Sub-division 6 of article 560 of the Code of Criminal Procedure provides that though a continuance shall not be granted as a matter of right, still, if the application therefor be overruled and the defendant be convicted, a new trial should be granted, if it appears upon the trial that the evidence of the absent witnesses was material, and that the facts set forth in the application were probably true.
2. SAME.—The rule which should govern the action of the trial court in passing, first, upon an application for a continuance, and subsequently upon a motion for new trial, has heretofore been stated by this court as follows: "If there is such conflict between the inculpatory facts and those set forth in the application as to render it improbable that the facts stated in the application are material and probably true, the continuance should be refused; and hence, a new trial based thereupon should also be refused. There must, however, not only be such a conflict, but the inculpatory facts must be so strong and convincing as to render the truth of the facts set forth in the application improbable." See the

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opinion for the substance of evidence set forth in an application for a continuance, which, the continuance being refused, demanded of the trial court, in view of the evidence on the trial, the award of a new trial.

3. **SAME—CUMULATIVE FACTS.**—An accused, resting his demand for a new trial upon disputed facts, is not entitled to a new trial in order to produce testimony that is cumulative of his evidence on the trial, but the doctrine of cumulative facts does not apply to applications for continuance. But note that the facts set out in the application for continuance in this case are not merely cumulative.

APPEAL from the District Court of Shelby Tried below before the Hon. J. G. Hazlewood.

The indictment in this case charged the appellant, jointly with John Riden, Pedly Riden, James Riden, Henry Chumley, Henry Beckett, Will Booth and Wash Flournoy, with the rape of Minerva Horton in Shelby county, Texas, on the twentieth day of July, 1886. A severance being granted upon the application of the defendants, the accused was placed upon trial, resulting in his conviction, and the assessment against him of a term of thirty-five years in the penitentiary.

Pink McCollister was the first witness for the State. He testified that he was acquainted with defendant and with C. H. Horton, and his wife Minerva Horton, the alleged injured party. The witness was in the town of Centre, Shelby county, on the evening of Saturday, July 20, 1886. The outrage of Mrs. Horton was said to have been perpetrated on the night of that day. Between three and four o'clock on that evening the witness saw the defendant and the three Ridens, John, Pedly and James, together in that town. They were then between the court house and the store of Hicks & Bro. The parties named were standing off to themselves and appeared to be engaged in a conversation. Witness heard John Riden say that they were going out to Parson Horton's that night to have some fun. Witness then asked Will Booth if he was going with them, and he said that he was not, and the witness thereupon cautioned said Booth not to go. Witness was not more than five or six steps distant from the defendant and the Ridens when he heard John Riden make the remark stated. The witness, on the next morning, heard of the outrage perpetrated upon Mrs. Horton.

On his cross examination, the witness stated that he was brought to court by some one, but was not under process to appear as a witness. The witness first told Henry Chumley's wife of the statement he heard John Riden make on the evening

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of but before the alleged offense. The witness was passing within three or four feet of the Ridens and defendant when he heard John Riden's remark about going out to Parson Horton's that night to have some fun. He remembered that a wagon load of watermelons, apparently, but not to the knowledge of witness, in charge of Calvin Hammer, who was standing near it, was standing on the public square, a short distance from where the Ridens and defendant were when John Riden made the remark. It may have rained on that day, but witness did not remember that it did. The witness had been in town all day, doing nothing of particular importance. After he heard the remark of John Riden, and had seen Ben Bullard, he went home, meeting several people on the road. He could remember none of them. It was on Sunday morning after he had heard of the rape on the night before, that he repeated John Riden's remark to the wife of Henry Chumley. He did not remember that he had ever told anybody else about John Riden's remark, but he had talked to the district attorney about the case. He had never told H. B. Short that he knew nothing about the case, nor did Short ever ask witness what he knew, and what he would testify on this trial, nor had witness ever talked to any of the defendants about what his testimony on this trial would be. He did ask Short who the witnesses against Chumley were. The witness was in the court room but once during the trial of John and Pedly Riden. He came to town as a witness in John Parker's case.

At the time that the witness heard John Riden's remark, Will Booth was standing off at some distance, talking to a white man about the election. Witness took Booth off a short distance and advised him not to go with the boys to Horton's, as their fun might prove serious and cost trouble. Witness did not then know that the boys intended doing anything wrong. Will Booth, Henry Chumley, John, James and Pedly Riden and the defendant came to town together from towards Riggs's place. Witness did not tell H. B. Short, in the presence of his son, that when he saw defendant and the Ridens, they were standing near the wagon, eating water melons, and that any one could have heard their conversation. The witness did not tell the district attorney what he knew about this case until the said district attorney sent for him. He did not know how the district attorney learned that he knew anything about it. Mr. Hammer was treating a crowd of boys to water melons at the wagon at

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the time the witness overheard John Riden's remark. A day or two prior to this trial, Wash Flournoy, who was under indictment, asked witness if he told Mary Chumley "what the boys were going to do." Witness thought that he also talked to Nelse Stanley about the case.

Wash Flournoy was the next witness for the State. He testified that early on the morning of the Saturday of the alleged rape, Henry Chumley was at his house, and borrowed his pistol. Early on that night defendant, Jim Riden, Henry Becket and Henry Chumley came to witness's house and said that they were going to Horton's to have some fun. Henry Chumley took the witness's pistol with him. The witness got his pistol on the next day from under a fallen log near Mr. Carnahan's house. Chumley told him where he would find it. Witness was in Centre on that Saturday afternoon, and saw defendant, the Ridens and Will Booth, standing together near Sanders's store. They appeared to be engaged in a conversation which witness could not hear.

Cross examined, witness said that he left town, going home about sun down. Jim Riden came to witness's house early on that night, but witness could not now remember whether or not he ate supper with witness. The said Riden came to witness's house from the house of Alice Smith, who lived on Mr. Holman's place, south from witness. It was late in the evening on the said Saturday when witness went to town. Jim Riden was in town when witness got there. He did not know when Jim Riden left town. He only knew from what Jim Riden said that he came to witness's house from Alice Smith's house. Booth and the defendant were the next two parties to reach witness's house on that night. Henry Becket, who came from towards Centre, was the next to arrive, and Henry Chumley came a short time later. He said that he came from home, and he was riding Adeline McAdams's horse. Mat Booth was also at witness's house. The parties named, except Mat Booth, remained at witness's house but a short time, and left. Jim Riden did not mention Horton's name before the others arrived, nor until the parties started off, which was between nine and ten o'clock. Witness did not know who made the proposition to leave. Some one of them said they were going to Horton's to have some fun. Witness did not remember that he said anything in reply, nor did he remember that, after they left, he said anything to Mat Booth about their going to Horton's. The

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party, on leaving, went towards Centre, and witness did not see them again on that night. When witness met Jim Riden, in town, on that evening, he told witness that they were going to Horton's on that night. Defendant, Jim Riden and Henry Chumley came back to witness's house at a late hour, on that night, awakened witness, and told him to make room for them on his pallet. When Jim Riden told witness, in town, that they were going to Horton's that night to have some fun, he mentioned the names of Henry Chumley, John and Pedly Riden and the defendant as the parties who were going with him.

Minerva Horton was the next witness for the State. She testified that she was the wife of C. H. Horton, and, in July, 1886, lived with her husband on the place of Mr. Ed Hicks, in Shelby county, Texas, about two miles from the town of Centre. She was the person upon whom the outrage, charged in this case, was committed. Between eleven and twelve o'clock on the night alleged in the indictment, the defendant, John Riden, Pedly Riden and Jim Riden reached the witness's house, and from the outside called to know who lived there. The witness's husband got out of bed to go to the door. The witness cautioned him not to open the door, and he went to the window, opened it, and told the parties that the house was occupied by Parson Horton. They replied that he was the man they were looking for; that they had come there to kill him and intended to do it, and that he must come out of the house. Witness's husband then ran to the back door, and cried "murder" three times. He then ran back from the door and got under the bed. Some of the parties then pushed open the front door, and witness ran out through the back door. Outside she encountered Pedly Riden, who made her go back into the house. The parties then ordered witness to come out of the house and submit herself to their several carnal passions. Witness declared that she would do no such thing, when they replied that they would "take it." One of the parties then asked for the witness's husband, and she, thinking they would leave, told them that her husband had escaped. One of them replied that the witness was a liar, and ordered her to strike a light. She replied that she had no matches. John Riden then said that possibly Horton was under the house, and that he would light a pine torch. While he was getting the pine, Horton ran out of the house and escaped, followed by a shot from Pedly Riden's pistol. The three Ridens and defendant were standing together at the door, defendant being armed with

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a gun. After discharging his pistol at the fleeing Horton, Pedly Riden turned to defendant and exclaimed: "Give me the gun; head him; head him, boys!" The four men named then pursued Horton a short distance and returned. When they got back, witness pointed up the road, and said to them: "Yonder comes some men from Centre." The parties named, defendant and the three Ridens, then ran to the smoke house and got behind it.

They remained behind the smoke house but a short time, when they entered the house, defendant being in advance. As soon as he crossed the threshold, the defendant covered the witness with his gun, and said to her: "Lie down! we are going to have it." Witness replied beseechingly: "For God's sake don't make me do that; I do not want to do it; I have not been raised in that way." Pedly Riden then said to witness. "Flop over on that bed, God d—n you; we will raise you to-night! Get down there and open up them legs!" The defendant, who still had the witness covered with the gun, said to her: "Get down there and let them have it, or I will blow your brains out!" Pedly Riden then seized witness, forced her to the bed, laid her down, got on top of her, and had forcible connection with her. When he got through, defendant got on witness and had forcible connection with her. When he got through, Jim Riden had forcible connection with witness, and when he got through, John Riden got on witness and had forcible connection with her. When he got through, Pedly Riden got on witness again, and ravished her, and when he got through, the defendant did the same thing a second time. The defendant and the three Ridens subjected the witness to their passions at the muzzle of the defendant's gun, and by threats to kill the witness if she did not yield. The witness knew the parties well, and knew them when they raped her. The defendant, Pedly, John and Jim Riden, were the men who had carnal knowledge of witness, as above stated. As soon as witness was released by the parties, she went to the house of Jane Myrick, and told her the circumstances of the outrage. She did not see her husband again until the next day, when she reported the facts to him.

The rigid cross examination to which this witness was subjected elicited but little of importance, in addition to her statements on direct examination. She stated, however, that when she went out of the house and was met and sent back by Pedly Riden, he, Pedly, asked her if she knew any of the parties. Al-

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though she did positively know all of the parties, but being in fear of her life, she replied that she did not, when Pedly said that if he thought she did know either one of them he would kill her. Witness had been married about a year at the time of the outrage, and was childless, but was about four months advanced in pregnancy, and had miscarried during the previous fall. Witness had a hemorrhage of the womb a few days before the assault, the result of a fall. When the witness was released by the parties she caught up her house kitten and said something to it, when one of the parties, then in the act of leaving, turned to witness and said: "If you don't hush we will give you another round." They then left, going towards the Phillips place, and witness went to Jane Myrick's. Soon after daylight witness and Jane Myrick went to witness's house, and saw Horton returning home. She found her household things very much as she left them. The sheet on the bed was soiled. The sheet was put on the bed, clean, on Friday. Witness remained but a short time in her house, and went to the house of Joana Roberson. She saw the tracks of four men in the road, which said tracks led first from the direction of Centre towards witness's house, and then from witness's house back towards town.

Jane Myrick testified, for the State, in substance, that Minerva Horton came to her house about midnight on the night of the alleged outrage. She was apparently distressed, and told witness that defendant and John, Jim and Pedly Riden had outraged her. Witness, who lived about a quarter of a mile from Horton's house, did not hear any hallooing or shooting at Horton's house on that night.

Joana Roberson testified, for the State, that she lived about half a mile from Horton's house. She heard shouting and the report of a pistol on the night of the alleged outrage. A short while before the shouting and the shooting, the witness saw four colored men, whom she did not recognize, pass her house, going in the direction of Horton's.

W. T. Riggs testified, for the State, that he, as justice, presided at the examining trial of the defendants in this case, and remembered that a sheet and a woman's gown were exhibited on that trial; both articles were much soiled. The corrupt matter resembled the flow from the nose of a person with a bad cold, and witness supposed it was semen.

The State rested.

Amos Hooper was the first witness for the defense. He tes-

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tified, in substance, that he and John Riden were brothers-in-law. He lived near Buena Vista. He remembered distinctly that John Riden and his wife, Mandy, and Pedly Riden, arrived at his house on the night of Friday, the night before the alleged outrage. They came in on an ox wagon to get John Riden's bedding and take it to the house of his father, Peter Riden, near Centre. They left witness's house about eight o'clock on Saturday morning to go to Peter Riden's, near Centre.

Mandy Riden, the wife of John Riden, testified, for the defense, substantially as Hooper did, and, in addition, that she, John and Pedly Riden, on their return from Hooper's, reached Centre about sun down on the Saturday evening of the alleged rape. John and Pedly Riden got out of the ox wagon in Centre, and George Riden got in and drove it to old man Pete Riden's house. John Riden overtook the wagon before it got home, ate supper with the witness, remained with her until bed time, then went to bed with her, and did not leave his bed on that, the night of the alleged outrage.

B. M. Irish testified, for the defense, that he was a merchant and did business in Centre. He went out on the Buena Vista road, as well as he could recollect, on the evening of Saturday, July 20 (the date of the alleged offense), and, at a point between three and four miles, met John Riden in an ox wagon traveling towards Centre. He was not positive enough as to time to swear absolutely that it was on the Saturday of the rape that he met John Riden, but that was his clearest impression. Witness was a Mason, and if there was a meeting of the Masons in the lodge in Centre on that night, and witness was present, then the evening on which witness met John Riden was not the Saturday evening of the alleged rape.

Doctor J. W. Rogers was the next witness for the defense. He testified that he was called to treat Minerva Horton a short time before the alleged outrage. He found her two or three months advanced in pregnancy, with threatened abortion. He thereupon gave her medicine to prevent abortion, and directed her to use it until the fifth month of pregnancy was passed. A woman's usual period of gestation was nine calendar months, but the first child usually made its appearance two weeks earlier. If a woman be raped six times in immediate succession, by means of threats and the display of fire arms, and resists throughout each process, she will emerge from her severe trial very much fatigued, exhausted and mentally excited. It might

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be possible, but hardly probable, that she would feel like moving about the next day. Witness would not say that such an experience would necessarily disable her from moving about.

On cross examination, Minerva Horton's condition prior to and at the time of the alleged rape was stated to the witness hypothetically, and he declared that under such conditions abortion would not necessarily result from her treatment by the men. She had been taking medicine with which the witness had been very successful in the prevention of abortion. He carried one woman to her full period who had always aborted before, her abortions numbering seven. Medical authority records that in one instance the womb of a woman was opened for the purpose of removing an ovarian tumor, when it was found to contain a child. The womb was sewed up and the woman went her full period. Another record shows that a woman, whose womb was gored by an ox, carried her child the full period after the womb was sewed up. Medical records report many cases of full period children being born after extreme injury to the mother's womb. In other instances the slightest causes produced abortion. It depends largely upon the habits and temperament of the woman, whether given causes, great or small, will produce abortion. Recently discharged semen resembles the white of an egg, but becomes yellowish from exposure, and assumes the appearance of a discharge from the nose on a handkerchief. A woman who has once aborted is very likely to abort again at the same stage of pregnancy.

Doctor F. W. Fambro testified, for the defense, that he visited Minerva Horton on the sixth of June, 1886, and found her suffering from a hemorrhage of the womb. He treated her for threatened abortion.

Fannie Oats testified, for the defense, that she saw Minerva Horton in Centre on the Monday after the alleged rape, on which occasion Minerva told her that she did not know either John, Jim or Pedly Riden until they were pointed out to her by Joana Roberson. The witness was a sister of the Riden boys.

At this point, evidently for the purpose of impeachment, the defense recalled Minerva Horton, who denied the statements of the witness Fannie Oats, and declared that she was not in Centre on the Monday after the rape, and that, on the day during the succeeding week when she was in Centre, she saw the said Fannie at a distance but did not speak to her.

For the same evident purpose, the defense recalled Jane Myrick,

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who denied that she ever told one Charlotte Covington that Minerva came to her house on the evening of and after the rape, and told her that a crowd came to her house on that night and ran Horton off, but that she said nothing on that night about being raped, but told her the next morning.

Charlotte Covington testified, for the defense, that, some time after the alleged rape, she had a conversation with Jane Myrick, in which she expressed her belief to the effect that there was no truth in the report of the rape. Jane then told witness that Minerva came to her house on the night of, and after the rape, and told her that a crowd came to her house, and ran Horton off, and that she then fled; that Minerva said nothing on that night about being raped, but on the next morning told her that "all the boys had to do with her."

Henry Becket was the next witness for the defense. He testified that he worked on Bud Garrett's place on the Saturday of the alleged rape, and left his work late in the evening, reaching Centre about thirty minutes before sun down. He remained in town until dark. He saw Pedly Riden, defendant, Henry Chumley and Will Booth, in town. From town witness went to the house of Sylla Becket. Thence, after remaining a time, he went to Wash Flourney's house, where he found Will and Mat Booth and Chumley. Jim Riden and defendant reached Flourney's house at different times, after witness arrived. After remaining at Flourney's for a while, witness, Chumley, Will Booth, Jim Riden and defendant left, and went, over several routes described by witness, to Horton's house. No others than the persons last named went to Horton's. Witness was certain that John and Pedly Riden were not in the crowd. Some one of the crowd asked in a loud voice: "Who lives here?" The answer was: "Parson Horton lives here." Something else, which witness did not understand, was said, when Parson Horton rushed out at the front door and fled, pursued by some of the boys, who, after following a short distance, returned. Minerva then said: "Yonder comes some white men from Centre," and the boys fled a short distance. Witness and Chumley got behind an out house, where they were presently joined by defendant, Jim Riden and Will Booth. All of them then left Horton's, and went off. No rape or attempt to rape was perpetrated upon Minerva Horton on that night.

On his cross examination, this witness said that no one followed Horton when he fled from his house, although on his

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direct examination he had said that some of the boys followed him. "The boys" told witness in town that they intended to go to Horton's that night to run him off, "just for fun." Witness did not go to Flournoy's to meet the boys, but went there to see Flournoy's folks, and "running up" with the boys, he went with them to Horton's to have some fun. The witness denied that he ever told Mr. Lucky that he did not go with the boys to Horton's. He denied that he went to Stephenson's house on that night, and declared that Will Booth did not leave the crowd from the time they left Flournoy's until after they left Horton's. He did not go by Stephenson's. In short, the crowd did not separate, further than a few yards, after leaving Horton's. This witness located himself and his companions in Horton's yard that night, but denied that any of them went into the house. Chumley did not tell the witness in town what kind of fun the boys expected to have at Horton's. He admitted that a pistol was fired at Horton's house, but declared that it was fired before Horton ran out of the house. In fact, it was fired before witness and Henry Chumley reached the house. The three other boys were about seventy yards ahead of witness and Chumley before reaching the house. Witness did not see Horton or his wife that night, but knew from her voice that Mrs. Horton at one time was out in the yard. Some one of the boys took a gun to Horton's on that night. During the trip it was handled by several or all of the boys. The witness admitted that he had denied to his mother that he was at Horton's house on that night. That was a lie, and witness did not think there was any harm in lying when in a hurry. He didn't have time to tell his mother the truth when she questioned him about the matter. Moreover he didn't want her nor any one else to know that he had been there. "People will talk."

Albert Riden, and other witnesses who located themselves at old man Pete Riden's house on the Saturday night after the outrage, located John Riden at old man Peter's throughout the night, and George Riden testified that Pedly Riden came to Pete Riden's about dark, and did not leave the house again on that night. Albert Riden denied that he ever told Beverly or Rody Gibbs that he would readily swear to a lie to get any of his family or color out of trouble.

Jane Myrick was again recalled by the defense, and after recapitulating her testimony with regard to her conversation with Charlotte Covington, denied that she ever told Att Booth [a dif-

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ferent person than Matt Booth] that Minerva Horton said nothing to her about being raped, on the night after the outrage was committed. On the contrary, she told Att Booth that Minerva did tell her that she was outraged by the defendant and the Ridenes, and that thereupon Att Booth said that he did not believe the boys raped Minerva, and pleaded with witness to testify that Minerva did not, on that night, tell her anything about being outraged.

Att Booth testified, for the defense, that he had two conversations with Jane Myrick within about six weeks after the alleged outrage. On each of these occasions Jane Myrick told witness that Minerva came to her house about midnight on the Saturday night of the alleged outrage, and told her that the boys came to her house and ran Horton off, but told her nothing about being raped until the next morning. Witness was not related to Will Booth. Matt Booth did not live at witness's house.

J. S. Stephenson testified, for the defense, that Will Booth came to his house about dark on the night of the alleged outrage, remained but a short time, and left, going towards town. The witness volunteered to prosecute this case in the justice's court.

On cross examination, he said that he knew Att Booth's reputation for truth and veracity, and that it was bad.

Chandler and Parker testified that Att Booth's reputation for truth and veracity was good. Chandler admitted that Att Booth once told him a lie about cutting some oats.

Henry Chumley testified, for the defense, substantially as did witness Becket. He declared that, although John and Pedly Riden were parties to the agreement to go to Horton's, they did not go. The parties who went were witness, defendant, Jim Riden, Will Booth and Becket. They went solely to "devil" Horton, scare him and run him off from his home. No outrage on Minerva was agreed upon, and none was committed. Witness got a pistol at Wash Flournoy's on Saturday morning, and, after keeping it in his possession about fifteen minutes, he put it under a log near Carnahan's house. He denied that he told Mr. Luckey that any of the boys went into Horton's house. Witness did not hear a pistol fired on that night.

J. J. Ramey, who lived on the road between Centre and Horton's house, and McKnight, who was in company with Ramey on that night, testified, for the defense, that, returning home from the Masonic lodge on the night of the alleged outrage, they

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saw five men near Ramey's place, one of whom was Henry Chumley. It was then about ten o'clock.

The defense rested.

G. W. Holman, R. K. Gibbs and Beverly Gibbs testified, for the State, in rebuttal, that they knew the reputation of Albert and George Riden for truth and veracity, and that it was infamous.

County Attorney J. A. Luckey testified, for the State, that he had a conversation with Henry Chumley, in jail, on the day after his arrest. Witness warned him against making any statements about the matter. Chumley said that he, defendant, Jim Riden, Booth and Becket went to Horton's house on that night, and that he wanted to plead guilty to a disturbance of the peace. He said that he did not, but the other boys did, go into the house, but he did not think they committed rape on Minerva Horton.

Doctor Furlow's testimony is stated in the opinion of the court.

Doctor Duke, testifying upon the same hypothetical case, said that abortion would not inevitably follow the circumstances detailed in this case, but that the woman, having aborted before, and being, at the time of the rape by six different and successive processes, three months advanced in pregnancy, she would almost necessarily abort.

Henry Becket, recalled by the defense, stated that four of the crowd went to Horton's by Mr. J. J. Ramey's place, and one went another route across a field. He denied that, on his examination in chief, he testified that he did not leave the crowd on that night. He did say that sometimes he was behind the crowd. It was seventy yards across the field referred to by witness. Witness was the man who went across the field.

C. W. Hicks testified, for the State, that Minerva Horton's reputation for truth and veracity was good.

W. T. Riggs testified, for the State, that he was present at the meeting of the Masonic lodge in Centre, on the night of the alleged outrage, and knew that B. M. Irish attended the lodge on that night.

Reuben Addison testified for the State, in rebuttal, that he was present and heard a conversation between Jane Myrick and Att Booth about the rape of Minerva Horton. Att Booth requested Jane to say that Minerva did not say anything to her about being raped until the morning after the alleged outrage. Jane declined to do so, but said that Minerva did, when she reached her house on that night, say that the defendant and the three Ridens had raped her.

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By witnesses introduced respectively by the State and defense, Att Booth's reputation for truth and veracity was alternately pronounced bad and good. Charlotte Covington's reputation for truth, as far as it was inquired into, was pronounced good, and that of Pink McCollister bad.

The motion for new trial raised the questions discussed in the opinion, and recites that, if the new trial was granted, Will Booth would be presented as a witness and would testify, in substance, that he was one of the five parties who went to Horton's house as stated by the witnesses Becket and Chumley; that they went to said house for no other unlawful purpose than to have sport with Horton by frightening him and running him from home, and that no rape was committed, or attempted upon Minerva Horton on that night.

On their separate trials, and substantially on the same evidence as that above detailed, James and Pedly Riden were also convicted of rape. They both appealed, and their convictions were set aside by this court for the same reasons as those assigned in the opinion in the present case. The accused, as it appears, were all colored men, and it is inferable that Minerva Horton was also colored.

D. M. Short & Son, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. On the eleventh day of November, 1886, the grand jury of Shelby county indicted the following named persons for rape upon Minerva Horton, viz: John Riden, Pedly Riden, James Riden, Bud McAdams, Henry Chumley, Henry Becket, Will Booth and Wash Flournoy. On May 19, 1887, the case was called for trial, whereupon counsel for the State entered nolle prosequi as to Will Booth, Henry Becket and Henry Chumley, and the defendant had these parties recognized as witnesses in his behalf. On May 20, 1887, the trial in fact began. On the morning of the next day, appellant for the first time discovered that Will Booth had absented himself. He had an attachment promptly issued for the witness, returnable *instantly*. The attachment was returned not executed, because not found in the county. Appellant then moved to withdraw his announcement of ready for trial, setting forth the above facts, as well as what he expected to prove by Booth, in his application for continuance.

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These motions were overruled, and a bill of exceptions was taken thereto. Being convicted, appellant, among other things, urged this in his motion for new trial.

Minerva Horton, the prosecutrix, was the only witness to the rape. She swears positively to facts which, if true, make a plain case of rape. Now, the indictment alleges that Booth, Becket, Chumley and Flournoy were guilty also of this offense, the charge against them, however, being dismissed. Minerva Horton does not implicate either of these parties, she swearing that the rape was committed by John Riden, Pedly Riden, Jim Riden and the defendant.

In his application to withdraw the announcement and continue the case, appellant swears that he expects to prove certain facts by Booth, who, it is alleged, was present at Horton's at the time of the supposed rape. If true, evidently these facts are material. The witnesses, Chumley for the defendant, and Flournoy for the State, corroborate the facts proposed to be established by Will Booth. These two witnesses agree as far as they go. They agree that the party started together from Flournoy's house, and as to the persons accompanying the party, to wit: Chumley, Jim Riden, Becket and defendant. Appellant expected to prove by Will Booth that John and Pedly Riden were not in the crowd. This expected proof is rendered probably true because Flournoy and Chumley swore they were not at Flournoy's house, the point from which the party started, and Chumley swore that they were not at Horton's with the persons who were there, he being one of the party.

Now, it must be borne in mind that the prosecutrix swears positively that John and Pedly Riden, with McAdams and Jim Riden, outraged her. By other witnesses very cogent facts are established, tending to show that John and Pedly Riden were not at Horton's on the night of the alleged rape. The testimony of Will Booth being thus material, not only for the purpose of showing that John and Pedly Riden were not at Horton's, but to show that no rape was committed by any person, we must inquire into its probable truth.

Having referred above to some matters strongly tending to its corroboration, we briefly notice the statute bearing upon this subject. Applications for continuance are not granted as matters of right. If the application be overruled, and the defendant be convicted, a new trial should be granted, if it appears upon the trial that the evidence of the absent witnesses or witness was ma-

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terial, and that the facts set forth in the application are probably true. (Code Crim. Proc.; art. 560, subdiv. 6.) Must the evidence on the trial affirmately show that the facts set forth in the application are probably true? If material and probably true, the case should not be continued, unless the facts are exculpatory or tend to discredit or explain the inculpatory facts. We therefore assert that, if the evidence adduced upon the trial shows the materiality and probable truth of the facts set forth in the application, the accused should not, in such case, be convicted. For, evidence tending to show the materiality and probable truth of the exculpatory facts is not sufficient to convict, of course. And if such a construction be given the statute, a new trial neither would nor should ever be granted, because of the overruling of the application for continuance, except in cases in which the evidence is insufficient to warrant a conviction—a case in which a new trial should be granted for want of sufficient evidence. These are the views of the writer alone.

We do not so construe the statute. If there is such a conflict between the inculpatory facts and those set forth in the application as to render it improbable that the facts stated in the application are material and probably true, the continuance should be refused, and hence a new trial based thereupon should also be refused. There must, however, not only be such a conflict, but the inculpatory facts must be so strong and convincing as to render the truth of the facts set forth in the application improbable. This is the rule announced in *Hollis v. The State*, 9 Texas Court of Appeals, 643.

We think it certain that appellant, Jim Riden, Will Booth, Henry Chumley and Henry Becket were at Horton's at the time prosecutrix says she was outraged. But that they were there for the purpose of rape is only shown by the testimony of the prosecutrix. This case presents some remarkable features—features of fiendish brutality which are almost without parallel; if it be true that the outrage was committed as testified by the prosecutrix. According to her testimony, the physical act of raping was perpetrated six times in succession so continuous that there was not a moment of intermission between the separate acts, these acts being participated in by four different persons, to wit: Bud McAdams, John Riden, Pedly Riden and Jim Riden.

Doctor Furlow, an expert witness, testified that in the case of a woman such as this, she being twenty-eight years old, one year

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married, and at the end of the third or fourth month of first pregnancy aborted, at the end of one year pregnant again and again threatened with abortion, and some three or four months advanced in pregnancy, that a woman of such antecedents, assaulted by four men with guns in hand and raped six times by them, would in ninety-nine cases out of a hundred abort again. This witness, with other physicians, states that under the above circumstances, abortion would not necessarily follow. Now, applying the rule above stated, we do not think that the criminalizing facts are of such a character as to render the truth of the facts set forth in the application for continuance improbable. It is true that appellant, with others, was at Horton's for an illegal purpose. Appellant insists that they were there for the purpose of having some sport by frightening and running Horton from his home, and that this was the only purpose. The State contends that this was for the further purpose of ravishing his wife, Minerva Horton. The testimony of Minerva Horton supports the theory; that of Wash Flournoy, Henry Chumley and the facts set forth in the application for continuance, tend to support the theory of appellant. There is a direct conflict between Chumley and the prosecutrix, the former corroborating the facts stated in the application.

The Assistant Attorney General urges, in support of the action of the court below, that Flournoy, Chumley and Booth rest under suspicion because they may be accomplices. As to Chumley and Booth, the State's theory, based upon the evidence of the prosecutrix, is that they were not at Horton's at all. The extent of Flournoy's connection is that he was informed of the purpose and intention of the party to go to Horton's, and that he furnished a pistol. There is no evidence that he knew of an intended rape.

The Assistant Attorney General, while conceding the materiality and probable truth of the facts set forth in the application, insists that the facts expected to be proved are cumulative, etc. In this there is a mistake, for by examination and comparison, it will be seen that Chumley swore that he left at a certain time with some of the party, leaving Booth with others. Booth covers this hiatus by showing that he was with the parties left by Chumley, and that there was no rape committed by his companions. We do not think that the doctrine of cumulative facts applies to motions for continuance, especially to a first applica-

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tion. This is a well known doctrine when considering an application for new trial upon merely disputed facts.

We conclude that the continuance should have been granted, or a new trial awarded. The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered October 26, 1887.

No. 2638.

JOE AND JOHNSON HEARD v. THE STATE.

1. **MURDER—CHARGE OF THE COURT.**—The correctness of a charge of the court is to be tested by its sufficiency as a whole. Murder of the first degree was the only grade of homicide presented by the evidence in this case. It was objected that the charge, in applying the law of express malice to the facts in proof, was too general as to the design to kill, inasmuch as it did not limit it to the particular design to kill the deceased. *Held*, that, in view of the charge as a whole, the objection was hypercritical.
2. **SAME—CIRCUMSTANTIAL EVIDENCE.**—It is only when the inculpatory proof is wholly circumstantial that the trial court is required to charge the law of circumstantial evidence.
3. **SAME—FACT CASE.**—See the statement of the case for evidence *held* sufficient to support a conviction for murder of the first degree.

APPEAL from the District Court of Harrison. Tried below before the Hon. J. G. Hazlewood.

The appellants in this case were convicted of murder in the first degree, and awarded a life term in the penitentiary, under an indictment which charged them jointly with the murder of A. H. Kinney, in Harrison county, Texas, on the twenty-sixth day of August, 1886.

Joseph Scott was the first witness for the State. He testified, in substance, that, on the twenty-sixth day of August, 1886, he found the dead body of A. H. Kinney lying between the rails on the track of the Texas & Pacific Railway. When he found the body, the witness was on a hand car, going to the town of Longview. Felix Turner, who was with the witness, remained with

24	108
28	315
29	396

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the body, and witness went on to Longview to notify the coroner of the discovery. Witness found the body at a point about two and a quarter miles east from Longview, and about one and three-quarter miles from the deceased's house. The discovery was made about half past six o'clock in the morning. The deceased, on the evening before, at about six o'clock, rode with the witness on his hand car from Longview. A few minutes after Kinney got on witness's car, on that evening, the witness stopped the car on a curve of the road to listen for an incoming train, and, while so stopped, one Jim Bell came to the track near the car from the woods. The witness observed, when he found the body, that the back of the head had been cut by a passing train. A leather grip sack was about the neck of the body.

Felix Turner testified, for the State, that he was with Joseph Scott when the body of Kinney was discovered on the railway track, and he was left by Scott to guard the body. Witness went to the house of Dorcas Kinney, the wife of deceased, and reported the discovery of Kinney's dead body. The defendant Johnson Heard was there. He and his co-defendant, Joe Heard, were sons of Dorcas Kinney by her former husband. Johnson lived with Kinney and his mother then, and had lived with them for a year past. Dorcas Kinney manifested great grief when told that her husband was dead, and that his body was then lying on the railway track in the "cut." Johnson Heard, on being told of the finding of the body, said: "I told you he was dead; I will get a wagon from Mr. Harris to move him." Johnson then went off, and soon came to the body in a wagon, Mr. Harris coming with him, riding a mule. Harris and Johnson went to Longview, and in the evening returned to the body with a coffin. When Mr. Harris first reached the body, he turned it over and said: "Why, he is shot; we must get a coroner." Kinney's body was taken to the house of a woman who lived near the cut where the body was found, and was there prepared for burial. When Johnson came with the wagon to the body, before going to Longview for the coffin, he drove past the body before stopping. Witness, who was with the body, could not be seen from the road. Johnson Heard was present at the inquest over the body.

Sam Huffman testified, for the State, that he saw the dead body of Kinney on the railway track on the morning of its discovery. He counted eleven small buck shot holes in the back. An old satchel, containing two bottles of whisky and

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some small pistol cartridges, was on the body. Witness had no recollection of seeing Johnson Heard at the inquest over the body. He had never heard either of the defendants utter any threats against the deceased. Witness remembered the trial of one Jim Bell for shooting into the house of Dorcas Kinney after the death of A. H. Kinney. The witness was a witness on that trial, and returned home from Marshall on the same train with Jim Bell, and with the defendants and other witnesses. The party got off the train at Lansing Switch, and a row between defendants and Bell occurred. Witness heard the quarreling, but did not hear either of the defendants say that they put twelve buck shot through Kinney, and would do the same to Bell.

Thomas Griffin testified, for the State, that he saw the body of the deceased on the morning that it was found. He saw twelve buck shot holes in the breast. At about eight o'clock a. m. witness went from the body to the house of Dorcas Kinney, and there found Mr. Phillips and the defendant, Johnson Heard. At that time witness saw a gun on the gallery, standing against the wall. Mr. Phillips took up the gun and looked at it. When he replaced it, the witness examined it, placing one of his fingers in one of the barrels. When he withdrew his finger he found it powder moist. About two months after the killing of Kinney, at which time he, witness, was standing on Jim Bell's premises, about fifty yards from the railroad track, he saw both of the defendants walking the railroad track, going towards Longview. When about opposite Bell's place, Johnson Heard, speaking in a loud tone of voice, said: "I put twelve buck shot through Kinney, and there are two more I want to put them through, and I don't care what the hell then happens." Witness testified on the trial of Jim Bell for shooting through Dorcas Kinney's house. The parties to the trial and the witnesses boarded the same train after the trial was over. The parties all got off the train at Lansing Switch. As witness left the switch, he heard Joe Heard, who was quarrelling with Bell, say: "I put twelve buck shot through Kinney, and will put them through you." Old man Tucker, Buck Tucker, Reel, Flowers, Huffman and Nick Harris were present. Jim Bell did not go to the house where Kinney's body was prepared for burial, but told witness to go and help, and that he would pay witness for the time lost by witness.

On his cross examination, this witness said that he lived on

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Jim Bell's place when Kinney was killed. Johnson Heard spoke very loud when, walking on the track, he said that he put twelve buck shot through Kinney, etc. Jim Bell and his wife heard Johnson make the statement. Witness heard Bell and his wife afterwards discussing Johnson's statement. The witness would not swear that the gun he saw on Dorcas Kinney's gallery had been recently discharged, but the muzzle of the barrel into which he thrust his finger was smutty. In reply to a direct question, the witness stated that Johnson's words on the track were: "I put twelve buck shot through one son of a b—h. There are two more I want to get, and then I don't care what in the hell happens." He was required to repeat Johnson's words, and said that they were: "I put twelve buck shot through Kinney, and there are two more I want to put then through, and then I don't care what they do with me." Witness did not hear Joe Heard say anything at that time. Witness did not know who owned the gun he saw on Dorcas Kinney's gallery. Johnson Heard aided in preparing the body of Kinney for burial, and attended the funeral.

Justice of the Peace C. B. Dickard testified, for the State, that about two weeks before his death, the deceased appeared before him and made a criminal complaint against the defendant Joe Heard. Witness issued a warrant upon the said complaint, and placed it in the hands of an officer.

W. H. Tucker testified, for the State, that, subsequent to the death of Kinney, he attended the trial of Bell for shooting into the house of Dorcas Kinney. Bell, the defendants, witness and other persons, who attended the trial, returned from Marshall, where the trial was had, on the same train. They got off the train at Lansing Switch. The defendants got into a quarrel with Bell, and said that they would eat Bell up. Joe Heard said to Bell: "I put twelve buckshot through Kinney, and I will do you the same way!" Johnson Heard immediately said: "Yes we did." Joe Heard was then armed with a knife, and Johnson with a bar of iron. Huffman got between Bell and the Heard's, to part them. The defendants cursed the parties present as "d—d white sons of b—h's." James Green, Joe Harper, Dick McLendon, Lane Huffman and Bob Reel were present, and could have heard what the defendants said. Joe Heard provoked the quarrel with Bell. Witness and Johnson Heard once had trouble. Witness was summoned by an officer to aid in the arrest of the said Johnson. Johnson ran, and fired a pistol at the of-

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ficer. Witness followed Johnson, and fired two shots at him as he was escaping over a fence. One of the shots took effect in Johnson's arm. The witness denied that he had ever told N. J. Harris, at Lansing Switch, or elsewhere, that he knew nothing about this case.

Bob Reel testified, for the State, that he was present at Lansing Switch on the occasion referred to by the witness Tucker, and heard Joe Heard make the statement testified to by Tucker.

Lou Russell testified, for the State, that, on one Sunday morning, in the year preceeding Kinney's death, the defendant Johnson Heard came to her house, and she asked him how his mother was getting along with her new husband,—referring to deceased. Johnson replied that either he or Kinney would have to leave the place, or one or the other would be killed. Witness's brother was now in the penitentiary for the murder of the father of the defendants, the first husband of Dorcas Kinney. The State closed.

W. B. Heard, the first witness for the defense, testified that, some time during the year 1886, he hired the defendant Joe Heard to work for him. He never hired Joe but the one time, and then only for a day and a half.

Charles Sanford testified, for the defense, in substance, that in August, 1886, he was in the employ of W. B. Heard, in Marshall, driving W. B. Heard's team. Late in that month he was taken sick, and told W. B. Heard where he could find Joe Heard, so as to get him to drive his wagon during witness's illness. Mr. Heard got Joe, and Joe drove the team two days and a half. Joe Heard was in Marshall for two weeks during the month of August, 1886.

N. J. Harris testified, for the defense, that he saw the body of the deceased on the morning, after the killing. Johnson Heard came to witness's house on that morning, reported the killing of Kinney and borrowed witness's wagon to remove the body. Johnson drove the wagon to a point near where the body was lying under some brush. When witness first saw the body it was lying face downwards. He turned the body over, and discovered gun shot wounds in the back. Witness then informed those present that the body could not be removed until an inquest was held. The witness and defendant Johnson then went in the wagon to Longview, got a coffin and returned to the body about four o'clock p. m. On the return of the witness and Johnson, the body was taken to a house near by, washed and prepared for

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burial. Whenever the defendant, Joe Heard, was in the neighborhood, he stayed at the house of his mother, Dorcas Kinney, which was on the witness's place. Witness never heard of any difficulty between deceased and Joe Heard, further than the statement of some one, that deceased once filed an affidavit against Joe for some misdemeanor. Witness was present at Lansing Switch on the occasion testified to by witnesses for the State, but heard nothing of the statements of defendants as testified by said witnesses. He heard Joe Heard say: "I am no son of a b——h." Witness then called to defendants to have no row, but to go home. Tucker once told witness that he knew nothing about this case. Witness signed the bonds of the defendants after their indictment in this case. The witness was at the house of Dorcas Kinney on the morning of, and after, the killing of Kinney. He then saw an old gun, which he knew to belong to deceased, leaning against the wall on the gallery. Witness saw the said gun in the same place about two weeks before. He knew the gun well. One barrel could not be discharged, and the other could be discharged only by snapping it several times.

C. Fields testified, for the defense, that she reached the house of Dorcas Kinney about sun set on the evening of the day on the night of which A. H. Kinney was said to have been killed, and remained throughout that night. Johnson Heard, Haywood Heard and Louis Heard came in from work a few minutes after witness reached the house. Haywood told his mother that his stepfather, the deceased, had gone to Longview to get some whisky with which to make bitters to give his children to break the chills, from which they were suffering. Mrs. Kinney delayed supper until between nine and ten o'clock, awaiting the return of her husband. Haywood and Louis then complained of hunger, and Mrs. Kinney told them to eat their supper, but not to "mess" the things, as Kinney would have to eat on his return. Mrs. Kinney became very excited and uneasy about her husband as the night advanced, and walked the floor in great distress, calling for her husband. Johnson Heard, after eating his supper, lay down on the gallery with his brothers Haywood and Louis, and went to sleep. Witness was kept awake pretty much throughout the night with the tooth ache, and at different times was on the gallery and out in the yard. She knew as a fact that Johnson Heard did not leave his pallet at any time during the night of August 26, and she saw him next day when he got up, about sun rise, which was about the time witness left the house,

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resuming her journey to Longview. The witness was in no way related to the Kinneys nor the Heards. Mrs. Kinney did not go to bed at all on the night of August 26, but walked the floor, gallery and yard all night, in evident alarm about her husband.

Dorcas Kinney, the wife of the deceased and the mother of the defendants by a former husband, was the next witness for the defense. She testified that the defendant Joe Heard was twenty years old, and that the defendant Johnson Heard was eighteen years old. They were both small boys when witness had her land law suit with Jim Bell, in which suit Bell prevailed because the land involved was a part of his homestead property, and because his wife did not sign the deed to witness. Witness was at home on the night before Kinney's body was found. She testified substantially to the facts testified to by the witness Fields, locating Johnson Heard at her house throughout that night. She stated that the absence of her husband, so unusual—he having but twice absented himself at night since their marriage—alarmed her very much, and kept her awake and up all night. She and Kinney lived happily together, and the relations between deceased and the defendants was cordial and friendly. Deceased once filed a complaint against Joe Heard, but apologized for it afterwards, and explained to Joe that he filed it under a misapprehension of facts. Reconciliation between deceased and Joe Heard resulted from the apology. Joe Heard left the neighborhood about three weeks before the killing of Kinney, and did not return until the Saturday after the killing. Witness knew nothing of the death of her husband until on the morning after it occurred, when some one came to the house and reported it. Johnson then took witness to a neighbor's house, and went to Mr. Harris's to get a wagon to remove the body.

Haywood Heard testified, for the defense, that the defendant Johnson Heard slept with him throughout the night of the murder, and did not leave the pallet on that night. He declared that there was no gun standing on Dorcas Kinney's gallery on the morning after the body was found. The deceased's old gun was then in Dorcas Kinney's room, where it had been for two weeks. C. Fields came to Dorcas's house on the night of the killing, was there on the next morning when the death of Kinney was reported, and remained there throughout the day.

Annie Austin testified, for the defense, that Joe Heard was in the city of Marshall during the month of August, 1886. He stayed at the witness's house, and had been there several weeks

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at the time of A. H. Kinney's death. Witness heard of the killing on the Saturday after it happened. Kinney was said to have been killed on Thursday night. Joe Heard went to work for Mr. W. B. Heard on the preceeding Tuesday, and worked continuously for him until the succeeding Friday at noon. Joe Heard was at the witness's house in Marshall throughout the night of the murder, and did not leave it at any time during that night. Witness testified against Bell on his trial for shooting through Dorcas Kinney's house. She was in no way related to defendants.

Sid Curtis testified, for the defense, that he was deputy sheriff of Harrison county. The cut on the railroad track where the body of the deceased was found was about twenty miles from the city of Marshall.

Amos Gibbons testified, for the defense, that, during the previous term of the district court of Harrison county, Jim Bell offered to pay him twenty-five dollars to swear that he heard the defendants say that they killed Kinney, which offer the witness declined. The defense closed.

Jim Bell testified, for the State, in rebuttal, that, shortly before the body of Kinney was found on the railroad track, he was passing the house of the deceased, and heard deceased and his wife quarreling about deceased coming home drunk. Deceased applied a vile epithet to his wife, when the defendants interfered, and told deceased that they would give him until August 26 to get out of the country. Witness employed counsel to prosecute the defendants because he learned that the defense would attempt to fasten the murder upon him. Witness denied that he ever offered Amos Gibbons twenty-five dollars or any other sum to testify that he heard the defendants declare that they killed the deceased.

Ellen Nunnally testified, for the State, in rebuttal, that she was in Marshall during the time that Joe Heard stayed at the house of Annie Austin. Witness heard of Kinney's death on the Saturday after it occurred, which was on the preceding Thursday. At about nine o'clock on that Saturday night witness heard Joe Heard tell Annie Austin goodbye, and saw him leave Annie's house with his coat on his arm, and go towards the depot. About five o'clock on the next morning he passed witness's house going towards the house of Annie Austin.

The motion for new trial set up the grounds discussed in the opinion.

Opinion of the court.

Alex. Pope and W. H. Pope, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. This appeal is from a conviction of both appellants for the murder of A. H. Kinney, their step-father, the verdict and judgment being for murder of the first degree, with punishment in the penitentiary for life.

But one bill of exceptions was saved at the trial, and that was as to the sufficiency of the charge of the court to the jury. Murder of the first degree was the only grade of the crime called for by the facts and submitted by the court. No special instructions were requested by defendants.

The objection urged to the definition, or, rather, to the application of the law of express malice, in that it is general as to "the design to kill," and does not limit it to a particular design to kill the deceased, is, we think, hypercritical. A charge should be considered as a whole, in judging of its sufficiency. Taken as a whole, this charge is sufficient, especially in the absence of special instructions amplifying it if so desired. No one could have possibly been misled as to the party against whom the design to kill must have been entertained, in order, under the charge, to warrant a finding of express malice. By terms before used, it was declared and thoroughly understood that defendants were on trial for the murder of Kinney and no one else.

Again, it is objected that the court did not submit the law of circumstantial evidence. This was not a case of circumstantial evidence. If the State's witnesses are to be believed, statements and declarations amounting to direct confessions of guilt were made on two separate and distinct occasions by one or both defendants—at all events when both were present; and the same thing is shown to have been stated by each of the accused. If the witnesses were credible and these admissions believed, then defendants are each positively condemned out of his own mouth. It was for the jury below to pass upon the credibility of the witnesses. They have done so, and by their verdict they avouch the truth of their testimony. If this testimony is true, then it is sufficient to sustain the verdict and judgment.

No reversible error has been manifested on this appeal, and the judgment of the lower court is therefore affirmed.

Affirmed.

Opinion delivered October 29, 1887.

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No. 2630.

D. TINNEY v. THE STATE.

1. **THEFT—POSSESSION—INDICTMENT.**—"Actual care, control and management" of the alleged stolen property is, under our statute defining theft, such possession as will support an allegation of possession.
2. **SAME—CONSTRUCTIVE POSSESSION—VARIANCE.**—The indictment in this case alleged both the ownership and possession in D. The proof showed that, though the animal belonged to D., one H. found it on his premises, took it up, and staked and fed it on his premises, and proclaimed his intention to estray it. But, before H. could complete the estrayal of the said animal, it was stolen from the stake on his premises. *Held*, that the proof shows that H. had the "care, control and management" of the horse, which constituted possession; and therefore the variance between the allegation and proof of possession is fatal to the conviction.

APPEAL from the District Court of Gonzales. Tried below before the Hon. George McCormick.

This conviction was for the theft of a horse, the indictment alleging the ownership and possession to be in M. C. Doyal. The penalty awarded was a term of six years in the penitentiary.

M. C. Doyal was the first witness for the State. He testified, in substance, that he lived near the town of Harwood, in Gonzales county, Texas, and was the owner of the horse alleged in the indictment to have been stolen on or about July 17, 1886. The said horse was taken, without the knowledge or consent of the witness, from the range near Harwood in said Gonzales county, about the time alleged in the indictment. Witness saw the said horse at his house on the day before he was taken, and he recovered him about three weeks later from Doctor W. T. Jones, at the town of Hockheim, in DeWitt county, about thirty miles from witness's house. The horse referred to was an iron gray animal, blind of one eye, about fourteen and a half hands high, and branded and counterbranded HS on the left shoulder. A half circle X, the half circle being below the X, was branded on the same shoulder above the HS, and the letter F was branded on the left jaw. The horse was a gentle, well broken saddle and work horse, and was between six and seven years old.

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Cross examined, the witness said that he lived about a mile from the Gonzales and Caldwell county line. The horse ran upon the open range, generally in Gonzales, but sometimes in Caldwell county. Witness searched for the said horse throughout several days next succeeding his disappearance from the range. When he disappeared, the said horse had a collar and bell on his neck, which collar and bell the witness, about a week after his horse disappeared, recovered from Mr. Hurst, who lived in Caldwell county, ten or twelve miles from witness's house. Hurst lived two or three miles nearer the witness than did the defendant's father.

Doctor W. T. Jones was the next witness for the State. He testified, in substance, that he lived in the town of Hockheim, DeWitt county, Texas. He identified the defendant as the man who, at Hockheim, on July 24, 1886, sold him the horse mentioned in the indictment, and described in the testimony of the witness Doyal. Defendant, whom witness had never seen prior to the said July 24, rode up to witness's house from the pasture, about sunrise, and offered to sell or trade the horse. He then told witness that his name was Joe Fuller, or perhaps, he said Fulton. Witness traded an injured horse and ten dollars in money for the iron gray horse. In reply to witness's questions about the horse, the defendant said that he got the animal from one Thompson, near Thompsonville, on Sandy Fork; that he had known the animal a long time, and knew him to be a gentle, trustworthy saddle and work horse. After the trade, the defendant remarked that he had intended to go down the country, but, as he had got a lame horse in the trade, he would return home and put the said horse in a pasture. He took breakfast with witness and then left, taking the Gonzales and Cuero road towards Gonzales. Two or three weeks later the witness read the description of the iron gray horse in the sheriff's department of the Galveston News. He immediately wrote to Sheriff Jones, of Gonzales county, that he had the horse. A few days later, Mr. M. C. Doyal arrived at witness's house and proved the horse.

W. E. Jones, sheriff of Gonzales county, was the next witness for the State. He testified, in substance, that he knew the defendant to be D. Tinney. On hearing of the theft of Doyal's horse, the witness advertised the theft in the Galveston News. A few weeks later he received a letter from Doctor W. T. Jones, of Hockheim, and notified Mr. Doyal. The witness then arrested defendant for the theft of Doyal's horse. During the defendant's

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confinement in jail, the witness interviewed him for the purpose of finding out, if he could, what disposition defendant had made of the horse he got from Doctor Jones. Witness warned the defendant that whatever statement he might make could and would be used against, but not for him. He offered defendant no inducement to make any statement, nor did he promise or threaten defendant in connection with any statement. Defendant said in that conversation that he got the Doyal horse from a man at Mrs. Warren's near Thompsonville, and that Walter Warren was present at the time. He did not mention the name of the man from whom he claimed to have got the Doyal horse, but said that he rode that horse through the town of Gonzales, crossed the Guadalupe river on the iron bridge, whence he went down by Hamons's and recrossed the Guadalupe river near Hockheim. Upon information received from the defendant, the witness recovered the W. T. Jones horse. Witness had never known a man in Gonzales county named Walter Ward.

Walter Warren testified, for the State, that he had known the defendant for several years. His name was D. Tinney, and he lived on Tinney's creek, in Caldwell county, Texas. Witness lived with his mother on Sandy Fork, near Thompsonville, in Gonzales county, Texas. The defendant, riding a small paint mare, came to witness's mother's house about night on July 22, 1886. He sold that mare to witness's brother for twenty-three dollars on credit. He hung his bridle and saddle on the fence, and ate supper at witness's house. After supper witness told defendant that he was going to Bullard's house, a mile distant, to spend the night. Defendant replied that he would go, too. Before reaching Bullard's, defendant left witness, saying that he wanted to go to McCoy's house, and witness never saw him afterwards until after his arrest. Witness went to school next day with the Bullard boys, and when he got home from school the defendant's bridle and saddle had disappeared. Witness did not know by whom nor when the said bridle and saddle were taken away from the fence. The witness never saw the defendant at any time or place, trade for an iron gray or any other kind of horse. Defendant had no other animal than the paint mare when he came to witness's house on the said July 22 that the witness saw. The witness had never known nor heard of a man named Walter Ward in either Gonzales or Wharton county, where witness now lives. Mr. W. H. Ham was at the house of

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the witness's mother when defendant came there and sold the paint mare to witness's brother.

Cross examined, the witness said that before the defendant separated from him at the forks of the road and went toward McCoy's, he asked witness about Adam McCoy, and said that he wanted to see him. Adam McCoy left Gonzales county in the summer of 1886, and witness had not seen him since. Witness was not absolutely certain that it was on the evening of July 22 that defendant came to his mother's house, but knew it was late in July, 1886.

W. H. Ham testified, for the State, that he was constable of precinct number four in Gonzales county. Witness spent the night of July 22, 1886, at the house of Mrs. Warren, near Thompsonville. He found the defendant there that night. At about ten o'clock Walter Warren remarked that he was going to Bullard's to stay all night. Defendant replied that he would go with him. Defendant and Walter left, and witness saw no more of defendant. On the next morning the witness went to Waelder, accompanied by Ed Warren, Walter's brother, who rode a small paint mare. Witness knew it was the night of July 22, 1886, when he saw defendant at Mrs. Warren's. He knew by referring to his return on a search warrant which he executed on a negro's house the night before. Witness was born and reared in Gonzales county, near Thompsonville, and knew all the people in that section. No such man as Walter Ward ever lived in Gonzales county. Adam McCoy was the son of John McCoy, who lived about a mile from Mrs. Warren. Adam is now a refugee from justice, and has not been in Gonzales county since the summer of 1886.

The State next introduced in evidence the defendant's sworn application for an attachment to Wharton county for Walter Ward. The said application recited that the said Walter Ward was a resident of Gonzales county, but was temporarily absent in Wharton county, and that defendant expected to prove by him that he, defendant, purchased the alleged stolen horse in a fair and open market, and paid a valuable consideration for the same. The State also introduced, in evidence, the attachments issued upon the defendant's application for the said Walter Ward, and then issued to defendant for Walter Warren, Ed Warren and Adam McCoy. The State then rested.

John B. Cole was the first witness for the defense. He testified that he lived on Tinney's creek, in Caldwell county. He had

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known the defendant for several years, during which time the defendant's reputation for honesty was good. On the third Sunday in July, 1886, the witness was on the Harwood and Lockhart road, when he saw a one eyed iron gray horse, branded with a half circle X, traveling said road, going from the direction of Harwood towards Lockhart. Thinking that the horse had escaped from some one at a neighboring camp meeting, witness stopped and detained him for some time. No one coming up to claim the said horse, witness released him, and he trotted off up the road. The witness could not say that the horse he saw and stopped on the road was the Doyal horse.

L. O. West testified, for the defense, that he lived on Tinney's Creek, in Caldwell county, about a mile from old man Tinney's. He had known defendant for many years, during which time defendant's reputation for honesty was good. About July 18, 1886, the witness observed a one eyed iron gray horse, branded half circle X, and something else, and wearing a collar and bell, about his place. That animal remained among witness's horses for several days and disappeared. Since then, witness had not seen him. Witness was related to the defendant.

James Cole testified that he was at Ellis's store, on Tinney's creek, in Caldwell county, on the evening of July 21, 1886. While he was there, J. W. Hurst rode up on a flea bitten gray horse. Hurst said that he "pulled" the said horse. Witness had known the defendant-always, but knew nothing about his reputation. The witness was related to defendant.

On his cross examination, this witness said that defendant was at Ellis's store at the same time Hurst was, and left the store with Hurst, riding a small paint mare. Witness did not see the defendant again for ten or twelve days, and did not know where he was during that time. When Hurst said that he "pulled" the horse, he was talking to a crowd, and spoke in a jocular and laughing manner. The gray horse was then hitched to a rack in full view of all the parties at the store.

D. L. Ellis, the defendant's brother-in-law, and proprietor of the store referred to by James Cole, testified, for the defense, that, on the evening of July 21, 1886, J. W. Hurst rode an iron gray horse up to his store. Witness had been trying to sell Hurst a horse, and when he saw him with the gray horse he concluded that he had got him one. As Hurst entered the store the witness asked him where he got the gray horse. He replied that he bought the horse and paid forty dollars for him. That

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horse was branded HS. Witness remembered seeing no other brand on him.

On his cross examination, this witness said that Hurst hitched the said horse in front of the store in full view of the crowd then assembled there. Defendant was at the store at the time, but witness did not see him again for ten or twelve days. On the next day Hurst passed the store, going toward Lockhart, and said that the gray horse had been stolen during the night. Witness was present at the defendant's examining trial, but did not testify. He went on defendant's bond, and was still on it.

G. Tinney, the defendant's father, was the next witness for the defense. He testified that the defendant was twenty-two years old at the time of this trial. When he was sixteen years old he left the witness's house and spent about two years in Guadalupe and Hardin counties. While he lived in Guadalupe county he went by the name of Joe Fuller. Since his return to Caldwell county he had lived with witness and D. L. Ellis, his brother-in-law.

On his cross examination, this witness said that when the defendant left home, as stated, he left without witness's consent, and, without his consent, took one of his horses. He left that horse in Guadalupe county, where witness got him. Defendant, previous to his departure, used that horse whenever he wanted to. Witness did not know what business defendant engaged in during his absence from home. Witness had never seen the gray horse involved in this prosecution.

L. O. West, recalled by the defendant, testified that, since his previous testimony he had examined the so called Doyal horse, and recognized him as the horse he saw with his horses in July, 1886. He now remembered that defendant once left home with one of his father's horses, which he left in Guadalupe county. That circumstance had escaped the witness's memory when he testified respecting the defendant's character. J. B. Cole was also recalled, and, in like manner, identified the Doyal horse as the horse he met in the road, and recalled to his recollection the defendant's unauthorized journey to Guadalupe county with one of his father's horses.

The defense closed.

J. W. Hurst testified, for the State, that he lived on Tinney's creek, in Caldwell county, Texas, and knew the defendant. On the twenty-first day of July, 1886, the horse mentioned in the indictment, and described in the testimony of the witness Doyal,

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came to the witness's house. He then had a bell on. Witness took the horse up and rode him to the house of a neighbor to see if said neighbor knew who owned him. Witness then rode the said horse to Ellis's store, where he met J. M. Jones, of whom he asked if a certain person did not own the said horse. Jones replied in the negative. The witness then related the circumstances attending the taking up of the horse. A large crowd was assembled at the store, and witness hitched the horse in full view of the said crowd. When witness ascertained that no one at the store knew who owned the horse, he bought pens, ink and paper with which to write out estray notices of the horse. Defendant came to the store, examined the horse, and stood for a while with his foot in one of the stirrups of the saddle. Witness told the defendant about taking the horse up. Witness left the store about sundown. He was soon overtaken by defendant, who rode along with him. In the course of the conversation about the horse which ensued, the defendant said: "If I were you I would get away with him." Witness replied that he would not do that for a caballado of horses. Defendant soon left witness, and witness did not see him again for ten or twelve days. After he reached home on that night, the witness staked the said horse in his field and gave him a bundle of oats. The horse was taken from that field during the night. On the next morning the witness found where the fence had been let down for the horse to pass out. He tracked the horse a short distance in a southeast direction, but soon lost the trail. Witness then went to the Ellis store and told the parties he found there about the disappearance of the horse, and rode on to Lockhart and reported the loss of the horse to the sheriff, with a description of the animal to be published in the Galveston News. Within a day or two witness learned that M. C. Doyal, of Gonzales county, had lost a horse answering the description of the one taken from witness's field. He wrote Doyal an account of his connection with the animal, and in a few days Doyal came to his house, and he gave Doyal the collar and bell he had taken from the horse. The horse had been in witness's actual, manual possession about five hours when witness rode him to Ellis's store.

Cross examined, the witness said that he may have said to J. B. Cole, that he "pulled" the horse. He had no recollection of saying to Ellis that he bought the horse, and did not believe he said any such thing.

M. C. Doyal, recalled by the State, testified that he went to

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Hurst's house in response to a letter he received from Hurst concerning his horse. Hurst gave him the collar and bell.

John B. and James B. Cole and L. O. West testified for the State that they had known J. W. Hurst for many years, and that his reputation for honesty had always been good.

The motion for new trial raised the questions discussed in the opinion.

Ponton & Fly, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. It was alleged in the indictment that the stolen horse belonged to and was taken from the possession of one M. C. Doyal. It was proven that Doyal was the owner of the horse; that it left his premises in Gonzales county, and strayed off with a bell upon it on the seventeenth of July; was seen in Caldwell county on the eighteenth, some twelve miles from home. On the twenty-first it was taken up by one Hurst, who, after making inquiry for the owner and failing to find him, took the horse to his home, intending to estray him, and there staked him out in his field and also fed him. That night the horse was taken from Hurst's field, and the next seen of him he was in possession of defendant on the twenty-fourth, in the county of De Witt, where he, defendant, sold him to one Jones.

On this state of facts it is insisted there was and is a fatal variance between the allegation and proof as to the party from whose possession the animal was taken. In a word, it is urgently claimed that the animal was stolen from the possession of Hurst and not of Doyal. If Hurst had simply found the animal an estray upon his premises, and, without taking actual manual possession and control of him, had only taken steps to estray him, it seems that until he had complied fully with the laws regulating estrays, such constructive possession would not have conferred upon him a sufficient special ownership to justify an allegation that he was the owner in possession, should the animal have been stolen from him. (*Blackburn v. The State*, 44 Texas, 457; *Lowe v. The State*, 11 Texas Ct. App., 253.) If, however, he had complied with the laws regulating estrays, then, indeed, he would have had such special property as would support an allegation of ownership in him. (*Cox v. The State*,

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43 Texas, 101; Jinks v. The State, 3 Texas Ct. App., 68.) His intention was to stray the horse, but before he had time to do so, it was stolen from him. When stolen it was in his "actual care, control and management," for he had it staked out in his field where he had fed it. "Actual care, control and management" is expressly declared by our law to constitute the "possession" contemplated in our statute of theft. (Penal Code, arts. 724, 729; Code Crim. Proc., art. 426; Bailey v. The State, 18 Texas Ct. App., 427; Frazier v. The State, 18 Texas Ct. App., 434; Littleton v. The State, 20 Texas Ct. App., 168.

In Blackburn's case, 44 Texas, 462, Roberts, Chief Justice, says: "If a person has taken actual control, and is in the full possession of a horse so as to be responsible to the true owner for the disposition of it, and the horse is taken out of his possession by one having no right or authority, it is a trespass as against the temporary possessor, and, if taken with intent to steal, the indictment may allege the horse to be the property of the person from whose possession it was taken. Hence it was held that when a horse got loose from his owner, and was taken in the field of a third person and placed in his stable, from whence he was stolen, it might be alleged to be the property of such third person who had the actual possession." (Citing Wharton's Crim. Law, sec. 1830; Owen v. The State, 6 Humphrey, 330.)

In Littleton's case, 20 Texas Court of Appeals, 174, Judge Hurt pertinently and forcibly says: "The indictment must allege that he (defendant) took the property from the *possession* of some *person*. This person must be named, and this person must have possession, actual or constructive, of the property at the time it is taken. If his relation to the property is rendered closer or nearer than that of the real owner, by reason of the fact that he is in actual care, control or management of the same, then, in that case, the person bearing such relation is the proper person in whom to allege possession; in other words, from such person the possession must be alleged to have been taken. Why? Because such person occupying such relation to the property is apparently the real owner, and the rule which requires that the indictment name the owner applies with equal force in the case stated."

We are of opinion that there is a fatal variance between the allegation and proof as to the person from whom this defendant took possession of the horse. At the time he was not in Doyal's, but was actually in the possession, care, management, control

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and charge of Hurst. (Bailey v. The State, 20 Texas Ct. App., 68; Briggs v. The State, Id., 106; Hall v. The State, 22 Texas Ct. App., 632.)

Appellant requested an appropriate instruction upon this point, which was refused.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered October 26, 1887.

No. 2594.

LEE DICKENSON v. THE STATE.

ASSAULT—EVIDENCE.—See the opinion and the statement of the case for evidence *held* insufficient to support a conviction for simple assault.

APPEAL from the District Court of Camp. Tried below before the Hon. W. P. McLean.

The indictment in this case charged the appellant with an aggravated assault and battery upon the persons of Annie Watts, Nora Gibson and Ollie Holt, females. The conviction was for simple assault, and the penalty assessed was a fine of five dollars.

Mrs. Watts was the first witness for the State. She testified, in substance, that she and her sister, Mrs. Gibson, and their little neice, Ollie Holt, went to church in a buggy, in Leesburg, Camp county, Texas, on the night of July 11, 1886. They started home in their buggy as soon as services were over, and had proceeded about three hundred yards on their journey, when the defendant and another man, both being horseback, came running up from towards the church. The defendant's horse struck the left hind wheel of witness's buggy, upset the vehicle, and seriously injured witness in the face, and more or less injured Mrs. Gibson and Ollie Holt. Witness was confined to her bed all of the next day, and was sore for several days.

Cross examined, the witness stated that the defendant helped her get free from the upturned buggy. He then said that his

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horse became unmanageable, could not be controlled by him and ran away with him. The road was very dry and dusty, and was being traveled by a large number of persons. Witness did not observe whether or not the bridle bit was out of the defendant's horse's mouth. The witness had no previous acquaintance with the defendant.

Mrs. Gibson testified, for the State, that her collar bone was broken by the fall from the buggy when it was overturned by the defendant's horse. The defendant's horse stopped across the road in front of the buggy after upsetting it, and the defendant dismounted and helped the witness, her sister and neice to get from under the vehicle. She had never previously known the defendant.

B. G. Watts, the husband of the first witness, testified, for the State, that he was on horseback, riding behind his wife's buggy, at the time of the collision. He heard the fast running of horses behind him, and hallooeed back to warn the riders, but could not say that his voice was heard. One of the horses ran against the witness's horse, and the other, defendant's horse, ran against his wife's buggy and upset it, throwing his wife, Mrs. Gibson and Ollie Holt to the ground. Witness dismounted and went immediately to the buggy, where he found the defendant assisting the ladies. He appeared to be greatly grieved, and explained that his horse became unmanageable and ran away with him. The little girl, Ollie Holt, was seriously hurt for the time being, and Mrs. Watts and Mrs. Gibson were slightly hurt.

Cross examined, the witness said that he had known the defendant about two years. He had never known of any misconduct on the part of the defendant previous to this affair. Witness afterwards met defendant going to his, witness's, house. Defendant then expressed his sorrow over the occurrence, and said that he was going to see what the damage to the buggy amounted to and pay it. He also offered to pay the doctor's bill. The witness was then on his way to see the justice of the peace, who had sent for him. The witness did not want to file a complaint against the defendant, but the justice of the peace insisted that he should do so. The horses of the defendant and his companion, Townsend, appeared to be running at full speed when the collision occurred. Defendant had never paid either the damages or the doctor's bill. When defendant proposed to pay the charges stated, the witness merely told him that it was all right, and did not give him an estimate of the amounts.

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The defendant was subsequently tried before a jury for horse racing on the public road, and was acquitted. His present attorney was then the county attorney, and vigorously prosecuted the horse racing case against him.

W. B. Carson testified, for the State, that, on his way home from church, on the night of the collision, and just before it occurred, the horses bearing the defendant and Townsend passed him in a fast run, but witness did not know that they were running away. They seemed to travel at the will of the riders, and the witness did not hear the word "whoa" spoken by either of the said riders. One of the horses stepped on a plank placed for footmen, across a small ditch. Witness thought then that the plank broke, but did not look at it on that night. The plank was at its usual place on the next morning, with a small piece broken from its side. Quite a number of people were traveling the road that night, some in advance and some in the rear of the witness. It appeared to the witness that the horses ran faster after they passed the plank than they did before they reached it.

William Friday was the next witness for the State. He testified that he, in company with a young lady, both riding horse back, attended church on the night of the collision. They had proceeded but a short way on their road home, but were in advance of witness Carson, when they heard the running of horses behind them. Soon the horses of defendant and Townsend passed witness on a dead run. As they passed witness he heard defendant call to Townsend to hold his, Townsend's, horse in, because while it was running, he, defendant, could not control his horse. The horses appeared to increase their speed after one or the other of them stepped on the plank referred to by the witness Carson. Witness knew the defendant only by sight, and knew nothing about the character of the horse ridden by the defendant on the night of the collision.

T. L. Skeen testified, for the State, that, when defendant and Townsend passed him at a point about seventy-five yards from the church, their horses were traveling in a lope. When they had gone about one hundred yards, the witness heard the horses strike a fast gait, and soon afterwards heard the ladies screaming.

Cross-examined, the witness said that he had known the defendant about two years, and had never known him to be guilty of misconduct prior to the collision. Witness was the

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justice of the peace who presided at the trial of defendant for horse racing at the time of the collision. The defendant was vigorously prosecuted on that trial, but was acquitted by a jury. The State closed.

J. A. Crampler testified, for the defense, that he had known the defendant over two years, and had never known him to be guilty of misconduct. He knew the horse ridden by the defendant on the night of the overturning of Mrs. Watts's buggy. That horse was an ungovernable animal in company with other horses, especially if another horse attempts to outravel him.

Robert Martin testified, for the defense, that defendant and Townsend passed him in a lope just before the collision with the buggy. In crossing a ditch the feet of one of the horses struck a plank. The plank was thrown up with a great noise, when the horses increased their speed to a run. Witness soon heard the screaming of the ladies, and went to where the buggy was overturned. Defendant's horse was standing across the buggy, and the defendant was trying to get him off. With the assistance of witness, the horse was taken from across the buggy, when defendant turned to the assistance of the ladies and witness led the horse off and hitched him. The witness knew the defendant's horse to be an unmanageable animal when excited, and especially if in company with other horses. Witness did not observe the bits of the bridle of defendant's horse, and could not say whether they were in the animal's mouth when he hitched him, or not.

Clarence Martin testified, for the defense, that he reached the upturned buggy about the time the defendant got the ladies from under it. The little girl was considerably hurt. The ladies and the defendant appeared to be greatly excited. Witness then went to defendant's horse, and found that the bridle bits were out of his mouth. Witness did not know how the bits got out of the horse's mouth.

Joe Smith testified, for the defense, substantially as Friday did for the State, adding that when Townsend's horse stepped on the plank and threw it up the end of it struck defendant's horse, and both horses increased their speed to a dead run. When the defendant and Townsend passed witness their horses were loping, and they seemed to be under control of the riders until the plank was struck. Witness had but a slight acquaintance with the defendant.

Sam Julian, testifying for the defense, said that he knew the

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horse ridden by the defendant on the night of the alleged offense to be an ungovernable animal when excited. He had known that horse to throw the defendant once or twice.

D. H. Townsend testified, for the defense, that he did not know defendant's horse, but knew that the horse ridden by John Townsend, the defendant's companion on the night of the collision, was an unruly, vicious animal, and in the habit running away. That horse, at the time of the collision, had been resting for some time in a pasture. Witness was John Townsend's father, and, had he known that John intended to ride that horse on that night, he would have prevented him.

A. S. Zachry, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. A jury was waived by the defendant and the cause submitted upon the facts to the judge, who found the defendant guilty of a simple assault. In our opinion the evidence does not support the finding of the judge. On the contrary, the evidence shows that defendant's horse became unmanageable, not subject to his control, ran away with him, ran against and upset the buggy in which were the ladies and the child, and thus caused the injuries for the infliction of which he has been convicted. To our minds the facts clearly show that the upsetting of the buggy was an act done by accident, and without such a degree of carelessness or negligence on the part of the defendant as rendered it criminal. (Penal Code, art. 44.) There was no intent on his part to injure, and without such an intent there could not be an assault in law. (Penal Code, art. 484.) The evidence repels the presumption of such an intent. (*Donaldson v. The State*, 10 Texas Ct. App., 307.)

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered October 29, 1887.

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No. 2466.

TIM ALEXANDER v. THE STATE.

1. **THEFT—POSSESSION—EVIDENCE—VARIANCE.**—The indictment alleges both the ownership and possession of the alleged stolen animal to have been in one W. The evidence shows conclusively that, when taken, the animal was under the care, management and control of one F., who held it for W. *Held*, that the variance between the allegation and proof of possession is fatal to the conviction.
2. **SAME—BRAND—CHARGE OF THE COURT.**—While the statute makes a recorded brand admissible as evidence of ownership, the statute does not make it prima facie proof of ownership, and it can be considered only as any other evidence before the jury could be considered. To have given a requested charge upon the effect of such evidence would, therefore, have been to give a charge upon the weight of evidence, which the trial court properly refused to do.

APPEAL from the District Court of Brazoria. Tried below before the Hon. W. H. Burkhart.

The conviction in this case was for the theft of a yearling, alleged in the indictment to be the property of, and to have been taken from the possession of, one E. N. Wilson. A term of three years in the penitentiary was the penalty assessed by the verdict.

The conviction in this case was reversed solely because of the variance between the allegation and the proof of the possession of the animal at the time it was taken. Upon that subject, the possession being alleged in E. N. Wilson, both Wilson and Fernandez testified that the said Wilson owned the animal at the time, but that it was then in the actual care, control and management of the said Fernandez, who was managing and holding it and other stock for the said Wilson.

The requested charge referred to in the second head note of this report, caption omitted, reads as follows: "When a brand has been properly recorded in the records of marks and brands of a county as provided by law, it is legal evidence of ownership of the person in whose name it is so recorded of all cattle found in that brand in said county." The evident purpose of this charge was to control the effect of the only testimony offered by the defense—the record of marks and brands from which it

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appeared that the brand on the alleged stolen animal was recorded in the name of Samuel Wilburn.

The motion for new trial raised the questions discussed in the opinion.

G. W. & F. J. Duff, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. It is alleged in the indictment that the animal stolen was the property of E. N. Wilson, and that it was taken from the *possession* of said E. N. Wilson. The evidence shows that the animal, at the time it was missed from its accustomed range, was under the care, management and control of one Fernandez, who had been hired by the owner, E. N. Wilson, to mark, brand and look after his stock of cattle, running on and about said Wilson's ranch. Said Fernandez had no authority to sell or dispose of any of said cattle, but had the care, management and control of them in all other respects. These facts constituted Fernandez the *possessor* of the cattle, and he, and not Wilson, was therefore in *possession* of the animal in question, at the time it was stolen, said animal being one of the stock of cattle under his care, management and control. Hence there is a material variance between the allegation and the proof of the possession of said animal; because of which, the conviction must be set aside. (*Hall v. The State*, 22 Texas Ct. App., 632; *Briggs v. The State*, 20 Texas Ct. App., 106; *Littleton v. The State*, Id., 168; *Bailey v. The State*, Id., 68; *Bailey v. The State*, 18 Texas Ct. App., 426; *Frazier v. The State*, Id., 434; *Tinney v. The State*, ante, p. 112.)

We find no error in the charge of the court; nor do we think that the court erred in refusing the special charges requested. One of said special charges was embraced substantially in the general charge, and the other, with reference to the effect as evidence of a recorded brand, was properly refused because upon the weight of evidence. While a recorded brand is admissible in evidence to prove ownership, the statute does not make it *prima facie* proof of ownership, nor attach to it any peculiar weight, or even expressly declare it to be admissible evidence. It is like any other evidence of ownership, and, having been admitted in evidence, is for the consideration of the jury

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like any other evidence, and the court is not required to, and ordinarily should not, call particular attention to it in the charge.

Because of the variance between the allegation and the proof as to possession, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

Opinion delivered October 29, 1887.

No. 2615.

CALVIN McCULLOUGH v. THE STATE.

ASSAULT TO MURDER—CHARGE OF THE COURT.—To constitute an assault with intent to murder, it must appear, 1, that an assault, coupled with an ability to commit a battery, was committed; and, 2, that at the time there existed in the mind of the offender a specific intent to kill. See the opinion for a state of case demanding of the trial court a charge in harmony with the rule stated, and note the statement of the case for evidence, which, however sufficient to establish an assault with intent to alarm, is insufficient to support a conviction for assault with intent to murder.

APPEAL from the District Court of Tarrant. Tried below before the Hon. R. E. Beckham.

The conviction in this case was for an assault with intent to murder one Lewis Taylor, and the penalty imposed was a term of two years in the penitentiary.

In substance, the State proved that the defendant and Lewis Taylor were fellow workmen in the employ of one Binyon, the proprietor of a line of freight floats in the city of Fort Worth. They kept their teams at the stable of the said Binyon. The two men, after feeding their respective teams on the morning of the alleged offense, left the stable at about the same time to go to their homes for breakfast. A dispute about a dollar and a half had occurred between them on the previous night. When, on the morning in question, they separated at the stable, and started to their respective homes, Taylor, speaking to the defendant, demanded the payment of the dollar and a half. Defendant replied that he did not then have the money. Taylor

24	128
29	617
24	128
30	537
24	128
33	280
33	311
33	353
24	128
37	645

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replied: "You d—d black son of a bitch, you have got to pay me," and seized a stone, which he threw at defendant striking him. Defendant then threw a stone at Taylor. Taylor threw a second stone at defendant, and, as defendant was in the act of throwing another stone at Taylor, Taylor called to him that if he threw it, he, Taylor, would get a gun and kill him. Thereupon defendant turned and went off in a direction different from that on which he first started. An hour or two later he came back to the stable, armed with a shot gun. He stopped at a point about seventy-five feet from the stable, and called three times to Taylor, asking if he was ready. At the last call Taylor walked leisurely from a shed to the stable, which he entered at the back door. While Taylor was passing from the shed to the stable, he was in easy range of the defendant. After Taylor passed through the door and into the stable, defendant fired, the small bird shot, with which the gun was charged, striking the door about the hinges. It was utterly impossible for the defendant, from where he then stood, to have so fired his gun as to strike Taylor at that time. The witness who saw the shooting testified that, at the time and ever since, it was his opinion that the defendant's purpose in firing the gun was to frighten and not to wound, injure or kill Taylor.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. To constitute an assault with intent to murder, two things must concur, viz.: 1, an *assault*, and 2, a *specific intent to kill*. (*Prewitt v. The State*, 20 Texas Ct. App., 129; *Davis v. The State*, 15 Texas Ct. App., 475; *White v. The State*, 13 Texas Ct. App., 259; *Harrell v. The State*, Id., 374; *Gillespie v. The State*, Id., 415; *Courtney v. The State*, Id., 502.)

In this case the evidence sufficiently shows that the defendant committed an aggravated assault by the use of a dangerous weapon in an angry and threatening manner, with intent to *alarm another*, and under circumstances calculated to effect that object. (Penal Code, article 489, subdiv. 3.) But the evidence further shows that, at the time such assault was committed, the ability to commit a battery did not exist, because the person at whom the assault was directed was in a position which rendered it impossible for the defendant to inflict a battery upon him with

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the gun. There was, therefore, no *assault* committed, except that character of assault named in subdivision 3 of article 489, above cited, which is an assault with *intent to alarm*, and not an assault with *intent to murder*, and is not applicable to the last named offense. To constitute an assault with intent to murder, the assault must be coupled with an ability to commit a battery upon the person assaulted—such an ability as is specified in subdivisions 1 and 2 of said article 489; and the court should have so instructed the jury.

Because the court failed to thus instruct the jury, and because the evidence does not support the conviction, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered October 29, 1887.

No. 2661.

ESTEVAN ROMERO *v.* THE STATE.

THEFT—FACT CASE.—See the opinion in *extenso* for the substance of evidence held insufficient to support a conviction for horse theft.

APPEAL from the District Court of Atascosa. Tied below before the Hon. D. P. Marr.

The conviction in this case was for the theft of a mare, the alleged property of John Birmingham. The penalty assessed against the appellant was a term of five years in the penitentiary. The evidence adduced upon the trial is summarized in the opinion of the court.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This is a conviction for the theft of a certain horse, the alleged property of John Birmingham. It appears that Birmingham lost a sorrel colt, about eighteen months old, in the summer of 1883. When lost the colt was branded B con-

Opinion of the court.

nected to top of a square. When found by Birmingham in the possession of Julian Perez, in September, 1886, it was branded R connected to right side of first described brand, under a semi circle.

Birmingham's testimony,—being upon the question as to whether the mare found in the possession of Perez was the colt lost by him in 1883,—is, in substance, as follows: "The colt was foaled mine. I only knew the animal, when I found it, by the brand. I could not swear to it, except by the brand. According to the best of my knowledge and belief it was my animal; but I could not swear positively to it, except by the brand. There was no flesh marks that I could swear to, except that it had a small neck, and its form. There were no special marks or flesh marks I could swear to. I knew it to be the same colt by its brand and by its small neck and form."

Birmingham's brand, so far as appears from the record, was not recorded. It is evident from his testimony, looking to all of his statements, that he did not know and would not swear to the animal found in the possession of Perez as his property, except from the appearance of the brand, together with the small neck and form. The brand, not being recorded, could furnish no proof of ownership whatever. It could not aid or strengthen proof arising from flesh marks, or from any other source. (Rev. Stats. art. 4561; *Coffelt v. The State*, 19 Texas Ct. App., 436; *Myers v. The State*, 21 Texas Ct. App., 448.)

The proof arising from flesh marks not being sufficient, when considered separate and apart from that arising from the brand, to establish ownership in Birmingham, most clearly there is a failure of proof upon this allegation.

The colt was taken, or strayed off in the summer of 1883; the mare,—supposed to be the same,—was found in defendant's possession, if shown to have been in his possession at all, in April, 1886, more than two and a half years elapsing between the two dates. Appellant's possession was not questioned; and if it had been we do not think it was sufficiently recent to call upon him for an explanation.

Because the proof of ownership is not sufficient, and because the proof of guilt is not sufficient, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered October 29, 1887.

Statement of the case.

No. 2642.

WILLIAM DWYER v. THE STATE.

SWINDLING BY FALSE PRETENSE—INDICTMENT.—An indictment for swindling by false pretense should positively and clearly aver the commission of the acts by the accused. If a written instrument enters into the offense as matter of inducement, the said instrument should be set out, as in forgery. See the statement of the case for an indictment *held* insufficient to charge the offense of swindling by false pretense; wherefore the motion in arrest of judgment should have prevailed.

APPEAL from the District Court of Fannin. Tried below before the Hon. D. H. Scott.

The appellant in this case was convicted of swindling, and his punishment was assessed at a term of three years in the penitentiary. Omitting the formal portions, the indictment reads as follows:

* * * * "that one William Dwyer and one Edward Eglinton and one J. L. Larkin, conspiring and acting together, on or about the 29th of October, 1886, in Fannin county, Texas, by means of false pretences and devices, and fraudulent representations, then and there knowingly and fraudulently made by them to John C. Brown and Lionel A. Sheldon, who were then and there receivers of the Texas & Pacific Railway Company, did induce the said John C. Brown and Lionel A. Sheldon, receivers as aforesaid, to deliver to them, the said Dwyer, Eglinton and Larkin, and the said Dwyer, Eglinton and Larkin did, then and there, by the means aforesaid, acquire from the said receivers of said The Texas & Pacific Railway Company, the sum of twenty-six dollars and forty-five cents (\$26.45) in money, of the value of twenty-six dollars and forty-five cents, the same being the personal and moveable property of said receivers of the said railway company, with the intent to appropriate the same to the use of them, the said Dwyer, Eglinton and Larkin, in this, to wit: The said Dwyer was then in the employ of the said receivers of the said railway company, and was then and there section foreman of section 80 of said The Texas & Pacific Railway Company, in said county, and had authority to employ and dis-

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charge laborers on said section No. 80 of said railway, and as such section foreman it was, under the rules and regulations of said receivers, the duty of said Dwyer, when any of the laborers working under him on said section No. 80 of said railroad, should be discharged by him, to report the fact of such discharge to the district road master, whose office was in the city of Bonham, in said county, and to make a statement to said district road master of the number of days such laborers so discharged had worked on his section on said railway, together with the amount due the laborer so discharged. That said J. L. Larkin was, on or about the 24th day of October, 1886, and long prior and subsequent thereto, the district road master of the district of said railroad which includes said section No. 80. That on or about said October 25, 1886, the said Dwyer reported to said Larkin that one Robert Kingston had labored twenty-three days at general track repairs in the month of October, 1886, on said section No. 80, at one dollar and fifteen cents per day, and that the amount due said Kingston for said labor was twenty-six dollars and forty-five cents, and that said Kingston was due hospital twenty-five cents, leaving still due said Kingston, twenty-six dollars and twenty cents. That it was then and there one of the regulations and the practice of the said receivers of said railway company, that, when any section foreman on said railroad makes a report such as the one above mentioned, to withhold twenty-five cents as hospital fees. That said Dwyer, Eglinton and Larkin well knew of said regulation and practice of said railroad receivers; that it was then and there the rule and practice of said receivers of said railway company for a district road master in their employ, on receiving at his office from a section foreman a report such as hereinbefore mentioned, to examine the same and report the amount therein found to be due to said discharged laborer and the amount of hospital fees due from said discharged laborer, to the division road master of the division of said railway which includes such district road master's district. That, on or about said October 25, 1886, and long prior and subsequent thereto, the said J. L. Larkin was district road master as aforesaid of said district number eighty, and the said J. L. Larkin then and there had in his employ the said Eglinton as his clerk in his said office. That conspiring and acting together with the said Dwyer, and intending to cheat, swindle and defraud the aforesaid receivers of said railway company, the said Larkin and Eglinton, on the twenty-fifth day of October, 1886, did report

Statement of the case.

to D. E. Grove, who was then and there the division road master on said railway, and whose division of said railway included said Larkin's district of said railway, that said Robert Kingston had labored twenty-three days at general track repairs in the month of October, 1886, on said section number eighty, at one dollar and fifteen cents per day, amounting to twenty-six dollars and forty-five cents, and that said Kingston was due the hospital twenty-five cents, leaving still due said Kingston twenty-six dollars and twenty cents. That the receiver of the said railway company furnished the said Larkin with a blank report upon which to make the report above mentioned, and that on October 25, 1886, he signed said blank report, and on the same day the said Eglinton, as said Larkin's clerk as aforesaid, with said Larkin's full knowledge and consent, filled out said report, as hereinbefore set forth, and the same was sent to the said D. E. Grove, whose office was then at Marshall, Texas; that, upon the receipt of the said last report at the office of the said D. E. Grove, one John W. Parks, who was then and there clerk in the office of the said Grove, did on the twenty-seventh day of October, 1886, in pursuance of the rules, regulations and practice of the receivers of said railway company, issue to said Robert Kingston, what is known as a discharge certificate, stating therein that the bearer, Robert Kingston, was entitled to pay for twenty-three days as a laborer on said section number eighty, in the month of October, 1886, at the rate of one dollar and fifteen cents per day, amounting to twenty-six dollars and forty-five cents, less twenty-five cents due hospital, leaving balance due said Kingston twenty-six dollars and twenty cents. That said Grove, believing said last report to be true and correct, did approve the said certificate, and sent the same to H. C. Phillips, who was then and there depot agent for said receivers at Bonham in said Fannin county, Texas. That said Phillips, as such depot agent as aforesaid, was authorized and empowered to pay off such certificates, by said receivers out of any funds and money in his hands belonging to said receivers. That, on or about the 29th day of October, 1886, the said Eglinton falsely represented to said Phillips, depot agent as aforesaid, that he was duly authorized and empowered by said Kingston to collect the amount called for in said discharge certificate as due said Kingston, and the said Phillips, believing said representation to be true, then and there paid the said Eglinton the same, to wit: \$26.20 in money, at Bonham, in said Fannin county, Texas, out

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of money in his hands belonging to said receivers, and the said Eglinton did then and there sign the name of one James Kingston to receipt for said amount, \$26.20. That the whole of said transaction on the part of said Dwyer, Eglinton and Larkin was a false and fraudulent combination, scheme and device to cheat, swindle and defraud the aforesaid receivers of said railway company; whereas in fact and in truth the said Kingston did not work as a laborer on said section No. 80 of said railway company under said Dwyer, during the month of October, 1886, nor at any other time; and whereas, in truth and fact, the said report made by said Dwyer to said Larkin, as aforesaid, was false and fraudulent, and said report made by said Larkin and Eglinton to said Grove was false and fraudulent, and the representations and statements made by said Eglinton to said Phillips, that he said Eglinton was authorized and empowered and entitled to collect said amount of \$26.20 called for in said certificate, as aforesaid, was false and fraudulent; whereas in fact and in truth the said Kingston did not labor twenty-three days on said section No. 80 during the said month of October, 1886, as shown by said Dwyer's said report, and whereas in truth and in fact, the said Kingston was not entitled to said \$26.20 as shown by said Dwyer's report, and whereas in fact and in truth said Kingston did not at any time labor on said section No. 80, and said receivers of said railway company were not indebted to said Kingston in any sum of money; and whereas, in truth and in fact, all the statements, representations and reports of said Dwyer, Eglinton and Larkin, as hereinbefore set forth, were false and fraudulent; and when in truth and in fact, said Kingston was not entitled to said \$26.20 as stated in said report, and as represented to said Phillips, and whereas the said Dwyer, Eglinton and Larkin, at the time of making each of said reports and said representations to Phillips, Larkin, Grove, and to said receivers of said railway company, well knew that they were all false and fraudulent, and that all of said pretenses, statements, devices and representations were false and fraudulent; that the said Robert Kingston and James Kingston mentioned in said report, certificate and receipt was one and the same person; that on or about October 29th, 1886, prior and subsequent thereto, the said Dwyer, Larkin, Grove and Phillips were in the employ of the receivers of the said Texas & Pacific Railway Company; contrary," etc.

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Taylor & Galloway, and Bramlette & Steger, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This is a conviction for swindling. The indictment alleges, that appellant Dwyer, Edward Eglinton and J. L. Larkin perpetrated the swindle, and that the money charged to have been obtained "by means of false pretenses and divers misrepresentations" was the property of J. C. Brown and L. A. Sheldon. The proof shows that the money was obtained from H. E. Phillips, the agent of Brown and Sheldon, with proper authority to pay the money.

The indictment alleges that Edward Eglinton, appellant's co-defendant, presented to Phillips the discharge certificate, making certain false statements at the same time and receiving the money. It then alleges "that the whole of said transaction on the part of the said Dwyer, Eglinton and Larkin was a false and fraudulent combination, scheme and device to cheat, swindle and defraud the aforesaid receivers of said railroad company."

Now, the property charged to have been obtained was twenty-six dollars and twenty cents. The indictment alleges that this money was obtained by Eglinton, a co-defendant. There is no allegation *directly* charging all the defendants with the commission of the acts constituting the offense. This is done in a very indirect and inferential manner.

The indictment must allege *directly*, not *inferentially*, the commission of the acts by the accused. Pleading the evidence instead of the acts will not suffice; and allegation is a matter quite different from the proof thereof. There is no direct allegation in this indictment which charges appellant and Larkin with committing or doing the acts constituting the offense for which appellant stands convicted. It is true that a conspiracy and acting together in making false representations to Brown and Sheldon is alleged, but the representation so made is not averred, and this allegation is therefore insufficient.

When Eglinton made the verbal representations to Phillips, they were directed to, or in relation to, a written document presented by him to Phillips. This document is called a "discharge certificate," and is as follows:

Syllabus.

"No. 3. BONHAM.
 \$26.20. MAINTENANCE OF WAY. No. 50.
THE TEXAS & PACIFIC RAILWAY COMPANY,
October 27, 1886.

The bearer, Robert Kingston, is entitled to pay for 23 days service as laborer on Sec. No. 80, in month of October, 1886, at \$1.15 per day.....\$26.45

Less board due to hospital (\$.25)..... 25

Balance due him Twenty-six $\frac{1}{10}$ dollars.....\$26.20

The above has been duly authorized, and will appear on the proper roll for the above month.

JOHN W. PARKS."

Without this "discharge certificate" Phillips had no authority to pay the money to Eglinton, and it is therefore evident that this certificate was the real and paramount inducement for Phillips to part with the money. No verbal statements made by Eglinton, be they ever so fraudulent and false, could have induced Phillips to pay out the money in the absence of the certificate. The rule upon this subject is that the indictment must set out the words used by the accused which induced the party to part with his property; whence it follows that, if in writing, the words and figures therein contained are the inducement, or a part thereof, and the voucher must be set out as in forgery. (*The State v. Edwin Green*, 7 Wis., 571, followed by this court in *White v. The State*, 3 Texas Ct. App., 605.)

The motion in arrest of judgment should have been sustained. The judgment is reversed and the prosecution dismissed.

Reversed and dismissed.

Opinion delivered October 29, 1887.

No. 2614.

WILLIE NICHOLS v. THE STATE.

MURDER—INTENT—DEADLY WEAPON—CHARGE OF THE COURT.—See the opinion and the statement of the case for the circumstances under which the trial court, on a trial for murder, should have charged the jury in conformity with article 612 of the Penal Code, which declares

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that "the instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appears."

APPEAL from the District Court of Tarrant. Tried below before the Hon. R. E. Beckham.

The conviction in this case was in the first degree for the murder of Lewis Schmidt, in the City of Fort Worth, Tarrant county, Texas, on the thirty-first day of March, 1887. The penalty assessed by the verdict was a life term in the penitentiary.

Frank Carter was the first witness for the State. He testified that he was a hack driver by occupation, and followed that business in the city of Fort Worth, Tarrant county, Texas. On the day alleged in the indictment, the defendant came to the witness's hack stand, in front of the Pickwick hotel, on Main street, in the said city of Fort Worth, and told witness that a man then on Sixteenth street had sent him for a hack, and that he, defendant, wanted witness to take the job. Witness consented, and defendant got up on the driver's seat with witness, and conducted him to the house on Sixteenth street, in which he said the man then was. Arrived at the house, the defendant got down, went into the house, and soon returned with a man named Schmidt. When Schmidt started to get into the hack defendant asked him for the twenty-five cents which he claimed Schmidt had promised him in payment for going for the hack. Schmidt threw the defendant some coin, which the defendant picked up and said was not enough, and that Schmidt "must go down for more." Schmidt said to defendant: "Go away, you black son of a b—h; that is all you will get," and, at the same time, kicked at defendant. The defendant seized a stone as Schmidt got into the hack, and was in the act of throwing it, when witness called to him not to do it, as he might break a glass in the hack door. Defendant did not then throw the stone, but said to Schmidt: "I will get even with you when you come back." The witness then asked Schmidt where he wanted to go. He directed witness to Wilderman's pawn shop, on Main street. Witness then drove from Sixteenth to Jones street, which was the first street east of Sixteenth street. The said Sixteenth street runs east and west, and Jones street runs north and south. He then drove one block north, up Jones street, to Fifteenth

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street, which runs east and west. Witness then turned west on Fifteenth street, and drove about forty-five feet, when Schmidt rapped on the hack door and directed witness to stop. Witness stopped, and Schmidt got out near the back door of the Tremont saloon. The Tremont saloon fronts on Jones street. It had a rear door on Fifteenth street. It also had a door on Fifteenth street near the corner of the building. When Schmidt got out of the hack near the back door of the saloon, he asked witness to go into the saloon with him and get a drink. At that particular point of time the witness heard the sound of a blow, and, looking towards Schmidt, saw him in the act of falling. At almost the same instant the witness caught sight of the defendant, fifteen or twenty feet beyond Schmidt, running towards the opposite side of the street. The witness did not see the blow struck, nor did he know who struck it. He had not seen defendant since Schmidt got into the hack on Sixteenth street, until he saw him running across Fifteenth street after Schmidt fell. Schmidt was struck on the back of the head. The place where the blow was delivered, and where he fell, was six or eight blocks distant from where Schmidt got into the hack. Schmidt was struck and fell about twenty minutes after he got into the hack. He died on the next day. Witness did not see the defendant when Schmidt got out of the hack at the Tremont saloon, nor did he observe Schmidt at that particular time, and was unable to say whether or not Schmidt saw defendant, nor whether or not he started from the hack towards defendant.

W. L. Hilderbrand was the next witness for the State. He testified that his occupation was that of a common carrier,—that is he drove a delivery or job wagon,—in the city of Fort Worth. On his way to the depot to meet a train, he traversed Fifteenth street. When he reached a point near the Tremont saloon, he observed the witness Frank Carter turning his hack towards the back door of that saloon. The then position of Carter's hack compelled the witness to stop his wagon. When witness got his wagon stopped he observed the man Schmidt south of Carter's hack, and going towards the back door of the Tremont saloon. About that time the defendant emerged from the alley in the rear of the Tremont saloon, and hurled a stone at Schmidt, which struck him on the back of the head, and felled him to the ground. Defendant was about twelve feet distant from Schmidt when he threw the stone, which was about the size of a man's hand. The

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witness did not see the defendant pick up the stone, and did not know when nor where he got it. As soon as he threw the rock, the defendant fled. Schmidt died on the following day.

Doctor Cooper testified, for the State, in substance, that the cause of Schmidt's death was concussion of the brain, resulting from the blow with the stone. The State introduced two or three other witnesses who testified to no material fact.

By his mother, sister and step father, the defendant proved that, at the time of this trial, he had passed his sixteenth, but not yet attained his seventeenth year.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. A rock or stone about the size of a man's fist was the weapon with which appellant struck the deceased the blow which caused the death, and, whilst it is proven that the death ensued from the means used, it is not proven that the stone was necessarily a deadly weapon, and the fact that appellant intended to kill can only be deduced from antecedent circumstances and the result or effects of the blow he inflicted.

In brief, these antecedent facts are that defendant had threatened to "get even" with Schmidt because he refused to pay the full amount defendant claimed to be due him. Defendant followed him several blocks, and, when an opportunity offered, he threw the stone, striking deceased on the back of the head, and at a time when deceased did not see or know of his whereabouts.

Under the facts developed, we are of opinion that the jury should have been instructed in conformity with the provisions of article 612 Penal Code, which declares that "the instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending; if the instrument be one not likely to produce death it is not to be presumed death was designed, unless from the manner in which it was used such intention evidently appears." It was the *intent* which was the essential point in the case, and the jury, in arriving at it, should have been instructed fully in the provisions of the law which furnished the criterion by which it should be ascertained.

We have carefully inspected the charge of the court, and it

Syllabus.

fails to present the law as it is written above in the plain and unambiguous language of the statute. In its application to the facts, the charge appears in part confused, and lacks the perspicuity and comprehensiveness characteristic of the learned trial judge.

For error of omission in the charge, as above pointed out, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered October 29, 1887.

No. 2643.

94	141
81	810

BOB COLLINS AND JIM LINDLY v. THE STATE.

1. **PRACTICE—CONTINUANCE—NEW TRIAL.**—However complete may be the diligence used to secure the presence of absent witnesses, as shown by application for continuance, the refusal of the continuance is not ground for new trial if the absent testimony in the light of the evidence adduced on the trial is not probably true.
2. **SAME—EVIDENCE.**—Under the provisions of article 772 of the Code of Criminal Procedure, the written testimony of a witness, taken at the examining trial of the accused, can be read in evidence "when, by reason of age or bodily infirmity, such witness can not attend." Under this rule it is not essential that the bodily infirmity shall amount to a permanent disability. As a predicate for the admission of the written testimony on the examining trial, it was shown in this case that the witness was at home, in another county, forty miles distant, where, at the time of the trial, and for months before, he had been confined to his house from the effects of an attack of measles, which had destroyed one of his eyes and left him a chronic invalid, with constant pains in his head and palpitation of the heart. *Held*, that in admitting the written testimony in evidence the trial court did not err. See the opinion on the question.
3. **SAME—CONFESSIONS—CHARGE OF THE COURT.**—To the rule that a confession is inadmissible if made by an accused when in arrest, unless made after warning that the same will be used as evidence against him, there is an exception when the confession comprehends a statement of facts "found to be true, and which conduce to establish his guilt." Inasmuch as the confession of Lindly, which was made during his confinement in jail, and in the absence of Collins, though made without warning, comprehended a statement of facts found to be true, and which conduced to the establishment of guilt, it was, upon the joint trial of Collins and Lindly, admissible as against Lindly, but not as against Collins. The

Statement of the case.

trial court, however, instructed the jury that the confessions could not be considered as evidence against Collins; wherefore, it is *held* that the action of the court upon the question raised on the confession was correct.

4. **THEFT—PRINCIPAL OFFENDERS—CHARGE OF THE COURT.**—In order to constitute the accused a principal in the crime of theft, it devolves upon the State to establish his complicity in the original taking. In view of the evidence in this case, and of the refusal of a charge based upon it, the failure of the trial court to apply this doctrine to the case, in so far as it concerned the defendant Lindly, was error.
5. **SAME—FACT CASE.**—See the statement of the case for evidence *held* to support the conviction for theft of the defendant Collins, but insufficient to support the conviction of Lindly.

APPEAL from the District Court of Fannin. Tried below before the Hon. D. H. Scott.

The appellants in this case were jointly indicted, tried and convicted for the theft of a mare and colt, the property of one Bob Carter. A term of five years in the penitentiary was the penalty assessed against each of the appellants.

L. C. Lamaster was the first witness for the State. He testified that he lived in Honey Grove, Fannin county, Texas, and that he knew both of the defendants, whom he pointed out in court. He first saw the defendants in the town of Honey Grove, of which town he was city marshal, on the second day of July, 1887. On the day mentioned, the defendants had in their possession a bay mare and colt. The bay mare was being offered for sale at a price less than half her actual value. She was worth at least forty dollars, and was being offered in the market for sixteen. The low price demanded for the animal aroused the suspicion of the witness, and he proceeded to question the defendants about the property. Collins said, in reply to questions, that his father gave him the mare in Arkansas, and that, for the last four or five years, he had been living with his father and family in Hopkins county. Collins was the man who was offering the mare for sale, and, at the time that witness interfered, had contracted her to Bowlin Wilkerson for sixteen dollars. The said Wilkerson was about to pay Collins for the mare, when the witness stopped him and arrested the defendants, remarking that he thought there was something wrong about the horses. Wilkerson thereupon canceled the agreement to buy. The defendant Collins did all of the talking, but Lindly was present. The witness did not hear Lindly say anything about the animals until

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after he was arrested and placed in jail. Witness arrested Collins and Lindly together, but confined them in separate cells. He had a talk with Lindly in jail after his arrest. Collins was not present at that conversation, nor did witness warn Lindly of the consequences that might follow his confession. Lindly told witness, in that conversation, that Collins took the horses in Hopkins county on the night before; that he tied the mare out all night, and came by his, Lindly's, house for him early in the morning, leading the mare; that Collins then told him that he took the mare and colt from Bob Carter, and asked him, Lindly, to go with him to Honey Grove, where he would sell the mare and get on a "bust" with the proceeds; that, if the witness would permit him, he, Lindly, would write to the post master at Fairlands, in Hopkins county, who would notify Carter, and it would be established that Carter owned the animals. Thereupon the witness wrote to Bob Carter, care of the post master at Fairlands, and a few days later the said Carter and one J. W. Cundiff came to Honey Grove, and Carter proved his property in the animals and they were delivered to him.

J. W. Cundiff testified, for the State, that he and both of the defendants lived at Fairlands, in Hopkins county, Texas. A few days subsequent to July 2, 1887, Bob Carter, who also lived near Fairlands, informed the witness that he had heard of his missing mare and colt at Honey Grove. He then requested witness to go with him to Honey Grove to recover them. Witness went, and found the animals described in the indictment in the possession of L. C. Lamaster, who had them in a livery stable. Witness identified them at once as the property of Bob Carter. This witness testified that the said Carter, at the time of the trial, was at his, witness's, house, in Hopkins county, physically unable to attend court. Some months prior to this trial, the said Carter was stricken with measles, which finally settled in his eyes, one of which the disease completely destroyed. The said Carter was not now actually confined to bed, but was totally unable to travel to Bonham to attend this trial. Witness and Carter started to Honey Grove immediately upon the receipt by Carter of Lamaster's postal card in reference to the animals. Witness once owned the mare in question, and knew her to be the property of Bob Carter. Both of the defendants lived near Bob Carter.

Nancy Carter, the mother of Bob Carter, testified, for the State, that her said son contracted the measles about three months before this trial, and had never entirely recovered. He

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was totally unable to attend this trial. The disease had destroyed one of the said Bob Carter's eyes. His present complaint was of severe pains in the head, and an internal affection, pronounced by the doctors to be palpitation of the heart. He was at present at the house of J. W. Cundiff, in Hopkins county, about forty miles from Bonham, and was confined to his room. The first that witness knew of the mare and colt being missing was when Lamaster's postal card, reporting them to be in Honey Grove, was received. Bob Carter left home in July, 1887, to attend the examining trial of the defendants in Bonham. In connection with this witness's testimony the State introduced in evidence the written testimony of Bob Carter upon the said examining trial. That instrument reads as follows:

"My name is Bob Carter. I live in Hopkins county. I know the defendants. They live in Hopkins county. About two weeks ago I saw them in Hopkins county, and about that time I lost a mare and colt. They were taken away from Hopkins county, Texas, and belonged to me. The mare was a bay animal and had a colt. Her brand, which was blotched, was, I believe, JJ with JJ underneath. I found the mare and colt in Honey Grove, in the possession of the city marshal. I found them on July 19, 1887. The animals were taken without my consent."

On her cross examination, the witness Nancy Carter testified that her son Bob, when a minor, worked for and earned a pony, which he exchanged for the mare. He had owned the mare between two and three years. Cundiff went with Bob to Honey Grove after the mare and colt, acting upon information received from Mr. Lamaster.

Bowlin Wilkerson was the next witness for the State. He testified that he met the defendants in Honey Grove, Texas, on or about July 2, 1887. They had in their possession a bay mare and colt, which the defendant Collins, who did all the talking, offered to sell the witness for sixteen dollars. Lindly was present, but took no part in the conversation or negotiations. Witness estimated the animals to be worth at least forty dollars. He agreed to pay and was in the act of paying Collins sixteen dollars for the animals, when Lamaster interfered and arrested the defendants.

District Clerk G. W. Blair testified, for the State, that two attachments were issued to secure the attendance of Bob Carter on the second day of September, 1887, that being the day originally set for the trial of this case. Both of those attachments

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being returned "not found," the case was reset for September 9, 1887.

The State closed, and the defendant offered no evidence.

The motion for new trial raised the questions discussed in the opinion.

Taylor & Galloway, for the appellants: The court erred in refusing special charge number two, to the effect that to convict defendant Lindly, the evidence must connect him with the original taking; and, further, if defendant Collins took the animal and Lindly was not present, and did not aid him by words or acts, and did not know Collins's unlawful purpose, to acquit. (*Morrison v. The State*, 17 Texas Ct. App., 34; *Warren v. The State*, Id., 207.)

The authorities above show that, in order to convict, the party must have taken the animal with the intention at the time to appropriate it to his own use. If it be true, as stated by Lindly in his confession, that Collins stole the mare, and that he (Lindly) knew nothing of said fact until next day, the theft was complete before his connection therewith, and he could not be convicted of theft. He might be guilty of having in his possession stolen property, knowing that it was stolen, but he was not charged with this offense. The charge asked by defendants presented this phase of the case, and should have been given, inasmuch as the question was ignored by the general charge.

The court erred in admitting the testimony of Bob Carter (the alleged owner of the stolen animal) taken before the examining court, because said Carter lived within the jurisdiction of the court, and the evidence failed to show that he could not attend on account of old age or bodily infirmity. We state as a proposition that the evidence must show that the witness had some bodily infirmity rendering him incapable of being in court, before the testimony in the examining trial can be introduced.

The mother of the witness stated that, some months prior to the trial, her son had measles, and they settled in his eyes and head; that he lost one of his eyes therefrom; that he had been confined to his room for some time, was in a low state of health, and was unable to travel or attend court; that he had something the doctors called palpitation of the heart. Cundiff testified substantially as Mrs. Carter, and in addition, said that, when

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he left home, two days prior to this trial, said witness was not confined to his bed, but was unable to leave his room.

Mr. G. W. Blair, district clerk, testified that two attachments had been issued for witness Bob Carter; that he was not found on the second of September, when this case was set for trial, and the case was reset for the ninth of September.

The examining trial evidence shows that Carter was in Honey Grove on July 19 and 20, hunting his horses, and found them. This was less than one and a half months prior to the second of September, 1887. (Code Crim. Proc., art. 772; 1 Whart. Crim. Ev., secs. 178, 179.)

The question presented by this assignment is the construction of that clause of the statute that permits this character of evidence to be introduced on the ground of bodily infirmity. From the authorities above cited it is clearly decided that the disease, sickness or ailment of the witness must be of such character as would advise the court that it would render the witness incapable of attending court at any future term by a postponement of the trial. The authorities further state that it would be much safer to continue the case than risk this character of evidence.

We think it was the intention of the Legislature, when these exceptions were engrafted on the laws, that the infirmity must be permanent and necessarily render the witness unable to attend the court at all. We believe this from the fact that the other grounds upon which such testimony can be received show, first, that the witness must be beyond the jurisdiction of the court, out of the State. If such witness is within the State, the court will continue for the testimony; second, when the witness is kept from the trial by the defendant; third, death; fourth, old age; and last, infirmity. Now, does the evidence show that this witness was so infirm as not to be able to attend the next term of the court? We think not.

W. L. Davidson, Assistant Attorney General, for the State: I do not think that the principle embraced in the appellant's second requested charge, to the effect that the appellant Lindly must have been present and aided and encouraged his co-defendant in the taking of the animals, is the law of this case. In the abstract the proposition is correct, but, in view of the fuller and closer instruction upon the fact, embraced in the general charge, the special charge was not necessary in this case. The true cri-

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terion as to principals, as defined by our statute, and decided by our courts, is not that announced in the charge requested and refused. The doubt of Lindly's connection with the theft is sufficiently set forth in the general charge, and the jury must have fully understood the matter. This could not affect Collins. The two cases cited by counsel for the appellant (*Morrison v. The State*, 17 Texas Ct. App., 34, and *Warren v. The State*, Id., 207), support the proposition embraced in the requested charge, but neither they nor the said requested charge are applicable to this case.

Cook v. The State, 14 Texas Court of Appeals, 96, lays down the rule as to principals under our statute. With the common law definition we have nothing to do, because our statute has settled this matter and defined and fixed a rule. The authorities cited go to the intent of the party at the time of the taking, and not the taking itself. The intent in this case is definite, even as to Lindly, and the question he raises is, does the evidence show he was connected with the taking so as to make him a principal? The court, in defining principals and in his charge on circumstantial evidence, fully submits all this question. It was one of possession of recently stolen property. His confession was a circumstance he told for his own benefit. It may be that his co-defendant stole the animal, and he came along to enjoy the benefits. This is not probable, and does not even raise any presumption of probability. The statement of his co-defendant in his presence of the nature of their ownership, through his father shows it untrue. These circumstances were all properly left to the jury and under appropriate instructions. The charge of the court presents the liability of appellant under the facts, and the law of the case as pertinently as was requisite, and it is thought there was no error in refusing the special charges insisted on. (*Scales v. The State*, 7 Texas Ct. App., 361; *Heard v. The State*, 9 Texas Ct. App., 1; *Cook v. The State*, 14 Texas Ct. App., 96.)

Did the court err in permitting the State to introduce the testimony of the owner, Bob Carter, as taken on the examining trial, and properly proved up, the said Carter being sick at the time of final trial, and unable to be in attendance on the court, and not out of the State?

This proposition is based on one phase alone of article 772, of the Code of Criminal Procedure, to wit: "By reason of bodily infirmity such witness can not attend." If the witness could be shown to be laboring under bodily infirmity at the

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time of the trial, and to such an extent as to prevent his attendance upon the court, then, the other requisites being complied with, and the proper predicate laid for its introduction, there is no reason why the evidence should not be used. It is seen by the numerous decisions of this court, that when the party has fled, or absconded, or is absent from the State, his written evidence can be used, provided in all of these cases enumerated the defendant has been confronted with the witness upon the trial at which was brought out the testimony. (*Pinkney v. The State*, 12 Texas Ct. App., 352; *Evans v. The State*, Id., 370; *Kirby v. The State*, 23 Texas Ct. App., 13; *Conner v. The State*, Id., 378.)

If the depositions can be used for one purpose, a proper predicate being first laid, or for one of the statutory causes, or under and by virtue of one of said causes, then the same could be used under and by virtue of any of the provisions of said statute provided the proper rules were complied with. (*Evans v. The State*, supra; Code Crim. Proc., art. 772.) One of those expressly enumerated is the "bodily infirmity" of the witness.

If the testimony was reduced to writing, or if the witness testified in the examining trial, and when the appellants were present, then, if the predicate was laid, the State could introduce the testimony. (Code Crim. Proc., art. 772.)

Now, then, was Carter shown to be afflicted with "bodily infirmity" such as is contemplated by the statute? It is thought he was. In the first place, words are, or must be, understood in our law in the sense in which they are understood in common language, unless specially defined. (*Penal Code*, art. 10; *Loyd v. The State*, 19 Texas Ct. App., 137; *Wade v. The State*, 22 Texas Ct. App., 256; *Williams v. The State*, ante, p. 17.)

We understand, then, by infirmity "the state of being infirm; an imperfection or weakness; especially a disease; a malady; as an infirmity of body." (*Webster's Dic.*, word *Infirmity*.) This is the usual meaning,—so understood in common language.

WHITE, PRESIDING JUDGE. This appeal is from a judgment rendered against appellants in a prosecution wherein they were jointly indicted, jointly tried, and both convicted for the theft of two horses, the property of one Bob Carter.

At the trial, they both joined in an application for continuance, for four absent witnesses, viz., Bob Glover, Albert Bailey, William Post and William McDonald, and swore they expected to prove by said witnesses that they bought the horses of the owner, Bob

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Carter, and paid him for them. Defendants offered no witnesses on the trial, but we presume that both Glover and Bailey were there. Bailey most certainly was, because his affidavit as to the citizenship of Post and McDonald, the other two absentees, is attached as a part to the motion for continuance, and he says nothing about the purchase of the animals from Bob Carter or any one else. If Glover and Bailey were present, then it is clear that defendants were most grievously mistaken as to what they would swear, and the fair presumption is that they were equally as badly mistaken with regard to Post and McDonald, who happened not to be served with process. At all events, if Post and McDonald should testify as proposed in the application, we think, in the light of the other evidence, such testimony would be most probably untrue. In so far as the defendant Lindly is concerned, such testimony is unquestionably shown to be untrue by his proven confessions, which, in material particulars, as we will see shortly, were proven to be true. This application for continuance, even if in conformity with statutory requirements, presents, for the reasons stated, no merit when considered as part of the motion for new trial.

Serious complaint is made that the court permitted, over objections of defendants, the written testimony of Bob Carter, the alleged owner of the stolen animals, as deposed and reduced to writing at a previous examining trial of defendants for this same theft. As a predicate for its admission, the prosecution proved that said Bob Carter was at home, forty miles distant in another county, confined to his room, which he was and had been unable to leave for some months, on account of the effect of a serious attack of measles, which had destroyed the sight of one of his eyes and left him a chronic invalid, with constant pains in the head and palpitation of the heart.

Our statute makes provision for the admission of such testimony "when, by reason of bodily infirmity, such witness can not attend." (Code Crim. Proc., art. 772.) The same rule applies as is provided for depositions in article 774 of the Code of Criminal Procedure. What is bodily infirmity? Mr. Webster defines "infirmity" "a disease," "a malady," "feebleness." Mr. Bouvier says *infirm* means weak, feeble, and he remarks that "where a witness is infirm to an extent likely to destroy his life or to prevent his attendance at a trial his testimony *de bene esse* may be taken at any age." (Bouvier's Law Dic., *infirm*, *de bene esse*.)

Speaking of the circumstances which justify the use of the

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testimony of an absent witness, Mr. Wharton says: "Sickness falls under the same rule. Thus, in an old case where a witness on his journey to the place of trial was taken so ill that he was unable to proceed, we find it recorded that his deposition was allowed to be read; and the same liberty would apply to depositions taken in a prior case between the same parties. At the same time it must appear that the sickness is of a character imposing permanent inability" (1 Whart. Ev., 2 ed., sec. 179; 1 Greenl. Ev., section 163); that is, "when, from the nature of the illness or other infirmity, no reasonable hope remains that the witness will be able to appear in court on any future occasion." In his work on Criminal Evidence the same learned author says: "Whether the deposition of a sick or insane witness can be taken in a criminal case depends upon local statutes, but wherever the deposition has been duly taken in a preliminary procedure it can be received in subsequent proceedings against the same defendant, the witness being unobtainable." (Whart. Crim. Ev., sec. 230.) This was the common law and is the general rule.

But our statute does not declare that the "infirmity" *must be permanent*. Under a modern statute, somewhat similar to ours, in England, it was said "there is nothing in the words of the statute which renders it necessary that the inability of the witness to attend at the trial should be permanent; it may, therefore, be implied that it may not be so. Before the statute, it seems to have been doubted whether a mere temporary illness (as with a woman about to be confined) was a sufficient ground for admitting the deposition. * * * And there can be no doubt that a judge would now exercise his discretion and decide whether in the interests of justice it were better to read the deposition or to adjourn the trial in order to obtain the oral testimony of the witness." (See note to section 230, Whart. Crim. Ev.) We think this is the correct doctrine applied to the construction to be given our statute in so far as it relates to bodily infirmity. The facts as to the witness Bob Carter would show him to be in a condition of bodily infirmity by reason of which he was unable to attend, and the court did not err in permitting his testimony to be read.

When the prosecution proposed to introduce in evidence the confessions of the defendant Lindly, they were objected to by both defendants upon the ground that he, Lindly, was at the time in jail, and he had not been previously cautioned that they

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might be used against him; and said confessions were also objected to by the defendant Collins because they were not admissible against him, he not having been present when they were made by Lindly. Lamaster, the city marshal of Honey Grove, who arrested defendants, swore that after he had put them in jail, he had a talk with Lindly in the absence of Collins, and Lindly said "that Collins took the horses in Hopkins county, Texas, on the night before, and tied the mare out all night, and came by for him next morning, leading the mare. That then Collins told him about having taken the mare, and told him (Lindly) to come and go with him, Collins, to Honey Grove, and that they would sell her, and they would have a bust on the money. * * * That the mare and colt belonged to Bob Carter, of Hopkins county, near Fairlands, and that if he, witness, would write to the post master at Fairlands, he would send the letter to Carter, and that they would learn that the mare belonged to Carter. Witness stated that he wrote to Bob Carter, in care of the post master, about the mare, and in a few days he (Carter) came to Honey Grove in company with J. W. Cundiff, and went to the stable where the mare and colt had been placed by witness, and pointed them out and took them off with him."

An exception to the rule that a confession made in arrest can not be used unless the party has first been cautioned that it may be used against him is where, "in connection with such confession, he makes statement of facts or of circumstances that are found to be true, which conduce to establish his guilt." (Code Crim. Proc., art. 750.) Such was the case in this instance. His statement as to who was the owner of the animals was found to be true, and the statement did conduce to establish his guilt. The confession was properly admissible under the circumstances as against the defendant Lindly. (*Speights v. The State*, 1 Texas Ct. App., 551; *Walker v. The State*, 9 Texas Ct. App., 33; *Kennon v. The State*, 11 Texas Ct. App., 356; *Allison v. The State*, 14 Texas Ct. App., 123; *Weller v. The State*, 16 Texas Ct. App., 201; *Bean v. The State*, 17 Texas Ct. App., 60; *Collins v. The State*, 20 Texas Ct. App., 400.)

But, whilst the confession was legitimate and admissible as against Lindly, it was inadmissible as to his co-defendant Collins, and the court so expressly charged the jury, and instructed them that they could not consider the confession as evidence against Collins. This is all that could be done where the parties were both on trial and the evidence valid as to one and not so as

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to the other. We find no error in the rulings connected with Lindly's confession.

It will be noticed from the foregoing that the State put in evidence the confession of Lindly. In connection with this confession, the other testimony affirmatively shows that he never made any claim to or exercised any control over the horses, nor did he attempt to make sale of them. He was simply present with Collins, who was the claimant of and the active party endeavoring to sell them. Now, if Lindly's confession was true, then he had nothing to do with the original "taking," or theft of the animals, and had no connection of any character with them until the next morning after their theft by Collins was complete. If he did not participate in the original taking, and took no part in its consummation, then he was not guilty of theft, however criminal his subsequent conduct might be. He must have been present and participating in the theft, or doing something at the time of its perpetration in connection with its perpetration—which would show an "acting together" between himself and Collins in the accomplishment of the contemplated crime—before he could be considered a principal offender in the eye of the law. (Penal Code, art. 74; *Smith v. The State*, 21 Texas Ct. App., 108; *Watson v. The State*, Id., 598, and see a full discussion of the subject in 6 Crim. Law Mag., 350, and note.)

Occupying this attitude to the transaction, the court should have charged specially with reference to the facts, so that the jury might have been enabled to pass intelligently upon Lindly's branch of the case. A special instruction upon the subject was asked by his counsel, and refused, and which, though not critically correct in itself, was sufficient to call the court's attention to the necessity of a charge pertinent to that branch of the case. As given, the charge of the court was too general under the circumstances.

In so far as the appellant Collins is concerned, we have found no error in the record demanding a reversal, and as to him, the judgment will be affirmed. For the defect in the charge of the court as to Lindly, which we have pointed out, and, moreover, because as to him the evidence, which was all State's evidence, is not, to our minds, conclusive of his complicity in the theft of the animals, the judgment as to him will be reversed and the cause remanded for another trial.

Affirmed as to Collins, and reversed and remanded as to Lindly.

Ordered accordingly.

Syllabus.

HURT, JUDGE, is of the opinion that "bodily infirmity," as used in article 774, Penal Code, means such infirmity as is apparently permanent, and he thinks the facts shown with regard to the witness Bob Carter establishes such apparent infirmity, and that his evidence was properly admitted in this case. With this explanation he concurs in the opinion.

Opinion delivered October 29, 1887.

No. 2489.

JAMES WOODSON v. THE STATE.

1. **PRACTICE—CHANGE OF VENUE—CASE APPROVED—CASE STATED.**—Upon his arraignment in the criminal district court of Harris county, in which court the indictment was presented, the accused filed his statutory application for a change of venue, which the trial court awarded, and ordered the venue changed to Galveston county. The accused objected that the venue should have been changed to the district court of Fort Bend county, as the nearest to Harris county, and upon arraignment in the criminal district court of Galveston county he pleaded to the jurisdiction of said court. *Held*, that the objection was futile, and the plea to the jurisdiction was properly overruled. Note the opinion for the approval of the ruling in Bohannon's case, 14 Texas Court of Appeals, 271, to the effect that the discretion confided to district judges to change the venue of their own motion to another county within or beyond their own judicial districts is a judicial and not a personal discretion, but one that will not be revised unless it was abused to the prejudice of the accused.
2. **FALSE SWEARING—EVIDENCE.**—The general rule is that the best evidence by which a fact can be proved, must be produced or its absence be accounted for before secondary evidence can be resorted to. But an exception to this rule is that the official character of an alleged public officer need not be proved by the commission or other written evidence of the officer's right to act as such, except in an issue directly between the officer and the public. The trial court did not err in permitting a State's witness to testify that he was the justice of the peace who administered the oath upon which the false swearing was predicated.
3. **SAME.—BILLS OF EXCEPTION** reserved to the action of the trial court excluding testimony will not be considered by this court unless they disclose the relevancy and materiality of the excluded evidence.
4. **SAME.—THE CHARGE OF THE COURT** in this case was deficient in failing to instruct the jury as to the legal meaning of the terms "willful" and "deliberately," but, inasmuch as no exception was reserved to the

24	153
28	83
24	153
30	51
32	436
24	153
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36	410

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omission, and it was practically supplied by a special instruction given to the jury, the omission is *held* to have been without prejudice to the accused, and the charge sufficient in substance.

APPEAL from the Criminal District Court of Galveston. Tried below before the Hon. Gustav Cook.

The conviction in this case was for false swearing, and the penalty assessed against the appellant was a term of two years in the penitentiary.

A. R. Railey was the first witness for the State. He testified that, on the twenty-ninth day of March, 1886, he was a duly elected, qualified and acting justice of the peace, in and for Harris county, Texas. On that day the defendant sent word to the witness to call upon him and swear him to an affidavit. Witness waited upon the defendant, who presented an affidavit, with certificate attached, and witness administered to him the oath, wherein he declared the truth of the matters set forth in the affidavit. Defendant then signed the affidavit, and witness attached his jurat to it. Witness did not read the affidavit. He could only fix the date of his transaction by the date of the jurat, which was March 29, 1886.

W. R. Baker testified, for the State, in substance, that he was one of the contestants for the office of mayor of the city of Houston, Harris county, Texas, in the municipal election of 1886. On the night of March 23, in that year, the witness, with Judge Brashear, now deceased, Ed Jemison, Henry Love, John Spriggins, Wyatt Davis, John Bentley and Tom Harris, the last six mentioned parties being colored, went to the "So-so" saloon, kept by a colored man, in the western part of the city. Their purpose in going to the said saloon was to attend a political meeting in progress there. After leaving that saloon, the witness and the parties named started to another meeting in another part of the city, on the opposite side of the bayou from the "So-so" saloon. Upon reaching a point between fifty and a hundred yards south of the Sabine street bridge, the witness observed a man on horseback, standing on the opposite side of the street, in the shade of a tree. That man called to the crowd and asked if "Mr. Baker" was in it. Witness replied in the affirmative, and the man said: "Step this way; I want to see you." Witness went to the horseman and stood by him, with one hand on the horse's neck. Witness took that man to be a full whiskered white man. Witness asked what was wanted,

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and the man replied that he was supporting Smith for mayor, and wanted the witness to withdraw from the race. The witness declined, with the remark to the man: "You must be joking." Thereupon the horseman opened fire upon the witness, firing three shots at him. Upon the firing of the first shot, the witness stepped backwards, and, his foot striking a rut, he fell to his knees and his beaver hat fell from his head. The horseman then fled rapidly across the bridge, followed by several shots fired by the witness's companions. The witness's assailant was riding a gray horse about fifteen hands high. Milton Baker and Ed Williams were neither with witness's party on that occasion. No one in witness's party called out: "Milton, let's play that trick," nor: "Hold it up, Milton." No one said: "Hold it up higher, Milton." No one took the witness's hat from his head on that night, nor was the hat of any one of the party removed by any other member of the party. No one cried: "Boys, you are not playing it right." No one said: "Some Smith man is trying to kill old man Baker." The assault described by witness occurred about nine o'clock p. m., on March 23, 1886, in Houston, Harris county, Texas.

Cross examined, the witness said that he offered a reward of one thousand dollars for the apprehension of his would-be assassin, and employed detective Hennessey to attempt the discovery of the man who assaulted witness. Witness did not make an affidavit against defendant, nor did he know that Hennessey made one. The witness was running for mayor of Houston as an independent candidate, against Mr. Smith, the nominee of the Democratic party, and his business at the "So-so" saloon was to solicit votes. The election occurred on April 5, 1886. Between the twenty-ninth day of March, the date of defendant's affidavit, and election day, some one made an affidavit against the defendant for false swearing, and he was taken before the justice of the peace for preliminary examination. The witness was served with a subpoena *duces tecum* to appear before that tribunal, and to produce the hat he wore on the occasion of the assault upon him. Witness did not produce the hat on that trial, and was unable to produce it on this trial. The witness stated in this connection that he had no family, and in March, 1886, was living alone, save his servants. His old negro cook took the hat into the kitchen, where she kept it on exhibition for seven or eight days. It disappeared in some way, and witness had not seen it since. Several persons, of whom, however, witness could now

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name only Mr. Terry Smith, saw the hat on the night of and after the assault. The said Smith was the first person to discover that the hat received a shot during the assault. Witness himself did not observe it until Smith called his attention to the hole. No white person, that witness could now remember, asked to or did see the hat, on or after the day following the assault.

Continuing, the witness stated that, after the assault, he and his party continued their journey to the Benevolent Hall, where another meeting was in progress. En route they met William Glass, who, mounted, was going toward the bridge to ascertain the cause of the shooting. They told Glass of the shooting, and Glass went with them to the Benevolent Hall. When the hall was reached, the witness secured a seat near the stage from which Marshall Tankersly was then speaking. As witness sat down he took off his hat, and Terry Smith called his attention to the bullet hole in the front of the hat, just above the band. The ball on its exit made a rent in the hat large enough to admit a man's finger. At that place the hat was slightly powder burned. Neither the witness's face nor his hair was burned. After Smith, some other parties examined the hat, and soon afterward, the meeting breaking up, the witness, with several parties, went to the Capitol Hotel. The would-be assassin was never apprehended. Witness saw Milton Baker on the street car after the meeting at the Benevolent Hall broke up. No laughter or hilarity followed the assault upon the witness. Witness did not remember that Judge Goldthwaite or other counsel represented the State on the preliminary trial of this defendant. Witness was present at the preliminary trial of the defendant, but did not remember that the attorney representing the State denied the right of the defendant to compel the witness, by subpoena *duces tecum*, to produce the hat. Judge Goldthwaite had been the witness's attorney for many years.

Terry Smith was the next witness for the State. He testified that he saw Mr. Baker at the Benevolent Hall meeting a short while after the alleged assault upon him. When Baker sat down and removed his hat witness observed a rent in the hat on the front part and just behind the band. It ranged downward, and the hat was somewhat powder burned. Witness asked Baker the cause of the rent in his hat, and he replied that a man had shot at him.

Milton Baker testified, for the State, that at the time of the attempted assassination of W. R. Baker he, witness, lived in

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the southern portion of the city of Houston. He was not with Mr. Baker's party at the time of the attempted assassination; nor was he in the neighborhood of the Sabine street bridge at that time, nor did he witness the attempt to kill Mr. Baker. He heard of the attempt some time after it occurred, and saw Mr. Baker on that night after the meeting at the Benevolent Hall broke up. He saw Mr. Baker as that gentleman boarded the up town street car, but witness did not get on that car himself. He knew nothing about the shooting except from hearsay.

George Hooper testified that he was with Milton Baker on the night of the attempted assassination of Mr. W. R. Baker, and corroborated Milton Baker's statement that he was not near the Sabine street bridge at the time of the attempted assassination.

Ed Williams testified, for the State, that he was not in Mr. W. R. Baker's crowd at the time of the attempted assassination, but was at the Benevolent Hall, and saw Mr. Baker and his party when they entered that hall after the shooting. Witness heard the shots fired near the Sabine street bridge.

Ed Jemison testified, for the State, that he was with the Hon. W. R. Baker at the Sabine street bridge when the shots were fired at him on the night of March 23, 1886. The party left the "So-so" saloon to attend the meeting then in progress at the Benevolent Hall. At a point near the bridge a man on a gray horse galloped past the party and across the bridge without checking his speed. Baker remarked that if he had that man before him he would fine him for galloping across the bridge. No member of the party recognized the man. When the party reached a point between fifty and a hundred yards beyond the bridge, a man on a large gray horse appeared on the opposite side of the street, and asked: "Is Mayor Baker in that crowd?" Mr. Baker stepped towards the man, and the man asked him to approach nearer. Baker then went to the man, placed his hand on the horse's neck, and asked the man what he wanted. The man replied: "I am a Smith man, and represent the Smith party. I want you to withdraw in favor of Mr. Smith, and it will be all right; I will make it all right with you." Baker replied to the effect that he would not withdraw from the race, when the man opened fire on him, firing three shots in rapid succession. Two of the shots were fired after Mr. Baker, in stepping back, had fallen to his knees on the ground. The man then fled, and witness and Love fired seven or eight shots at him. Neither Milton Baker nor Ed Williams was in the Baker

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crowd on that night, No one said: "Milton, let's play that trick." No one said: "Hold it up, Milton." No one said: "Hold it up higher, Milton." No one said: "Boys, you are not playing it right." No one said: "Some Smith man is trying to kill old man Baker." No laughter nor hilarity followed the shooting. Baker's party then went on to the Benevolent Hall, meeting Mr. Glass, and later met a party en route to investigate the cause of the shooting. Arriving at the Benevolent Hall, Mr. Baker took a seat near the speaker's stand, and it was then discovered that one of the balls fired at Baker had passed through his hat. Tankersly was speaking. After Tankersly's speech it was announced from the stand that somebody had shot at Baker, and the meeting broke up.

Wyat Davis, Henry Love and John Bentley, members of the Baker party who witnessed the shooting, testified, for the State, substantially as did the witness Jemison.

J. W. Temby testified, for the State, that early on the morning after the alleged shooting at Baker, the defendant told him of the shooting, giving in detail, substantially the same account that he afterwards embodied in his affidavit, except that he located the shooting near the Preston street bridge, which was three-quarters of a mile distant from the Sabine street bridge. Witness remarked that the reports of the affair located it near the Sabine street bridge. Defendant replied that the reports were in error, and that the shooting occurred as he said, near the Preston street bridge, and near Charley Ghering's saloon.

At this point the State read in evidence a part of defendant's affidavit, as follows: "On Tuesday night, March 23, 1886, I, in company with an Irishman called Pat, and two colored men named Milton Williams and Frank —, went on towards Sabine bridge. About the middle of the bridge we fell in behind a party composed of Mayor Baker, a white man whose name I don't know, and several colored men, among them Ed Jemison, John Spriggins, Ed Williams, Milton Baker, and others I know by face but not by name. We followed on behind until the party in advance reached the other end of the bridge. Then they halted and some one said: "Milton, lets play that trick." Our party stopped by the magnolia tree near the other end of the bridge. Some one then said: "Hold it up, Milton." Milton then pulled Mr. Baker's hat off his head. Then a voice said: "Hold it up higher, Milton." Then Milton held the hat up in his left hand, and fired at it with his right. After the shot was

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fired some one said: "Boys, you aint playing it right," and then they all commenced to cry out that some Smith man was trying to kill old man Baker." The State rested.

Mrs. Crosby was the first witness for the defense. She testified that she lived near the Sabine street bridge in the city of Houston, and heard the shots alleged to have been fired at the Hon. W. R. Baker, on the night of March 23, 1886. She went to her gallery, and heard loud laughter proceed from the direction of the bridge. As she was going into her house she saw a man on a gray horse ride rapidly by, and a few moments later she heard the loud laughter again, and concluded that a drunken crowd were firing off their pistols.

F. F. Chew, an attorney at law, testified, for the defense, that he was at the Benevolent Hall meeting at the time of the alleged assault on the Hon. W. R. Baker, and heard the firing of pistols in the direction of the Sabine street bridge. He saw Mr. Baker when he came into the Benevolent Hall, and examined his hat. The ball entered the hat just above the narrow band, and passed horizontally through it. The pistol from which that ball was fired was neither elevated nor depressed. Neither the hat nor Mr. Baker's face was powder burned. Witness knew something of powder burns, having been badly powder burned in the face on one occasion. The weapon from which witness was powder burned was discharged at a distance of about five feet from witness's face. A doctor afterwards extracted one hundred and twenty grains of powder from witness's face, and some of the grains were still in his face. From witness's experience he would say that if Mr. Baker's hat was on his head when the ball passed through it, it would inevitably have wounded Mr. Baker. Had the shooting occurred as detailed by the witnesses for the State, Mr. Baker's face and his hat would most inevitably have been badly powder burned.

Albert Spiller testified, for the defense, that on his return home from the business part of Houston, on the night of the alleged assault, he had to cross Sabine street bridge from south to north. Witness was riding a large iron gray horse, and rode in a brisk trot. Near the north end of the bridge witness met a party of five or six persons, walking. He did not recognize any of them, although he was acquainted with Judge Brashear. Shortly after he passed the party, witness heard several shots fired at the south end of the bridge, succeeded immediately by loud laughter. Witness turned his horse at once and rode back towards the

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crowd. He knew that no one did, or could have passed him from the time he passed the party on the bridge until the shots were fired. Witness followed the party to the Benevolent Hall, where he learned that somebody had tried to assassinate the Hon. W. R. Baker. Witness saw no one else in the neighborhood, and was satisfied that the claim of attempted assassination referred to the shooting he had heard at the bridge. Up to that time witness had supported Baker, but instantly transferred his support to his opponent. Witness was satisfied that no attempt at assassination had been made, and went home. It was light enough on the bridge on that night to see a dog.

Henry C. Thompson testified, for the defense, that he was an expert in the use of fire arms, and knew that a pistol would powder burn at a distance of five feet. He made some experiments on the day of this trial, firing at pieces of paper at a distance of five feet, and against a strong wind. He found that the powder from the pistol would burn holes in the paper at that distance. He did not believe it possible for a man to be fired at under the conditions testified by the witnesses for the State in this case, and escape powder burn about the face, hair and hat. The "So-so" saloon was a low negro dive, frequented by depraved negro men and women.

S. S. Ashe testified, for the defense, that, on the morning after the alleged assault upon Baker, he heard of the defendant making substantially the same statement he has since embodied in the affidavit upon which this prosecution is predicated. He asked defendant about it, and defendant related it substantially as it is set out in the affidavit, except that he located it at the Preston street bridge. Witness called his attention to the reports that it occurred at the Sabine street bridge. Defendant replied that he did not know one street or bridge from another by name, but piloted the witness to the point where the shooting occurred, and showed the magnolia tree under which he stood when the hat was shot. He then piloted witness to the Sabine street bridge, where the State locates the shooting, pointed out the magnolia tree, and again related the circumstances of the affair substantially as they are embodied in the affidavit.

The defense closed.

Mr. Harrison testified, for the State, in rebuttal, that he was at a brick yard near the Sabine street bridge on the night of the alleged assault upon the Hon. W. R. Baker. He saw a man on a gray horse cross the bridge on that night, and, shortly after the shoot-

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ing, recross it at a very rapid gait, and evidently in flight. No one passed the bridge, after the Baker party went over, for a long time. The first person to cross it after the shooting was a colored woman, going in an opposite direction from the Benevolent Hall.

Mr. Glazier testified, for the State, in rebuttal, that he kept a store near the north end of the Sabine street bridge. Witness heard the shots fired near the bridge, on the night of March 23, 1886, and shortly afterwards saw a horseman at full speed cross the bridge.

The facts as to the change of the venue appear in the first head note.

H. S. Fisher, J. B. Stubbs, F. S. Burke and C. A. Jones, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. With regard to the rulings of the court in changing the venue of this cause, and upon the defendant's plea to the jurisdiction, it is unnecessary that we should notice them further than to refer to the decision of this court in *Bohannon v. The State*, 14 Texas Court of Appeals, 271, where precisely the same questions arose, and after an elaborate discussion were determined adversely to the positions urged by defendant's counsel in this case.

It was not error to permit the State's witness Railey to testify that he was a justice of the peace of Harris county, and as such administered to the defendant the oath upon which the false swearing is predicated. While the general rule is that the best evidence by which a fact can be proved must be produced, or its absence accounted for, before secondary or inferior evidence is admissible, a well established exception to this general rule is that the official character of an alleged public officer need not be proved by the commission or other written evidence of the right of such officer to act as such, except in an issue directly between the officer and the public. Such proof may be made originally by parol evidence, and is sufficient if it shows the person to be a *de facto* officer. This exception to the general rule is founded upon public convenience, and is as well established as is the general rule. (1 Greenl. Ev., secs. 83-92; Whart. Crim. Ev., sec. 164; 1 Whart. Ev., sec. 78; Abbott's Tr. Ev., p. 193.)

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On the cross examination of the State's witness Jemison, the defendant asked said witness the question, "Have you not been confined in the penitentiary for crime?" Upon objection made thereto by the State, the witness was not permitted to answer the question; to which ruling of the court the defendant excepted. Defendant's bill of exception is very meagre. It does not disclose the purpose of the question, the objection made thereto, nor the answer expected to be elicited thereby. If it had shown that the defendant expected the question to be answered affirmatively, and that the object in eliciting such answer was to affect the credibility of the witness, we would hold that the court erred materially in refusing to permit the question to be answered. (*Lights v. The State*, 21 Texas Ct. App., 308.) As the matter is presented to us, however, we can not say that the ruling of the court was erroneous, or, if erroneous, that the error was prejudicial to the defendant.

There was no exception taken to the charge of the court, and but one special instruction was requested by the defendant, which was given. It is now, for the first time, urged that the charge is defective, in that it fails to instruct the jury in the legal signification of the words "deliberately" and "willfully," used in the statutory definition of this offense. In the respect complained of the charge is deficient. (*Steber v. The State*, 23 Texas Ct. App., 176, and cases there cited.) But, as the defect was not excepted to at the time of the trial, and as, in view of the facts of this case, such defect could not have reasonably caused injury to the rights of the defendant, especially when such defect was practically cured by the special instruction given at the request of the defendant, we must hold that the charge of the court is substantially sufficient.

We have given attention to all errors complained of, and have found no such error in the conviction as would warrant us in setting it aside; wherefore the judgment is affirmed.

Affirmed.

Opinion delivered November 2, 1887.

Opinion of the court.

No. 2655.

94 163
29 597

WILLIAM DUDLEY v. THE STATE.

1. **PRACTICE—EVIDENCE—EXECUTIVE PARDON.**—Conditional pardon will not restore to one convicted of a felony competency to testify as a witness in the courts of this State.
2. **SAME.**—The State having introduced a conditionally pardoned convict as a witness against the defendant, the latter, for the purpose of assailing the credibility of the witness, proposed to read in evidence the judgment of conviction against him for felony, which, upon objection by the State, was excluded. *Held*, that the ruling was error.

APPEAL from the District Court of Waller. Tried below before the Hon. W. H. Burkhart.

The conviction in this case was for the robbery of F. Schultz, and the penalty imposed was a term of ten years in the penitentiary. The offense was alleged to have been committed in Waller county, Texas, on the twenty-sixth day of August, 1887. The facts of the case are not involved in the rulings of the court. The charter of pardon was conditioned that it was "subject to revocation by the Governor of Texas whenever it shall be determined by said Governor that he (said convict) has violated any of the criminal laws of this State."

Harvey & Browne, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. With commendable and characteristic candor and fairness, the Assistant Attorney General confesses errors in this conviction, to wit:

1. It was error to permit the witness Shultz to testify as a witness in behalf of the State, over the defendant's objection, it being shown that said witness had been convicted of felony in this State, which conviction had not been legally set aside, and the said witness not having been legally pardoned for the crime of which he had been convicted—said witness having been conditionally pardoned only. (*Carr v. The State*, 19 Texas Ct. App., 635.)

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2. It was error to reject, when offered as evidence by the defendant, the judgment of conviction showing the conviction of said witness Shultz of a felony. This testimony was offered for the purpose of affecting the credibility of said witness, and for such purpose was admissible. (*Bennett v. The State*, ante, page 73.)

Because of said errors the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered November 2, 1887.

No. 2469.

DAN WEBB v. THE STATE.

1. **ADULTERY—EVIDENCE.**—It is essential to the validity of a conviction for adultery that the evidence show affirmatively that one of the parties to the adulterous acts was married and had, at the time of the alleged adultery, a spouse other than the party with whom the adultery was charged.
2. **SAME.**—The mere opinion of witnesses that a certain woman was the wife of the male charged with the adultery is not sufficient to establish the fact of marriage.
3. **SAME—MARRIAGE.**—An *actual living together*, as man and wife, of emancipated slaves, at the time when the Constitution of 1869 took effect, would constitute a legal marriage between said parties. But note that the evidence in this case fails to establish such a living together of the accused male and his alleged wife, or that they were emancipated slaves when said Constitution took effect; wherefore the evidence is insufficient to prove the legal marriage of the accused, and therefore insufficient to support a conviction for adultery.

APPEAL from the County Court of Upshur. Tried below before the Hon. John W. Hackler, County Judge.

Appellant and Hannah Staines were jointly indicted for adultery. The appellant being alone upon trial was convicted, and his punishment was assessed at a fine of one hundred dollars.

W. H. Hart was the first witness for the State. He testified, in substance, that he had known the defendant about fifteen

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years. He knew Hannah and Ann Staines. The said Hannah and Ann Staines and the defendant lived together in a house on the witness's plantation during the year 1885. The two Staines women had several children each, all of which called the defendant "father." The defendant once told the witness that he did not deny any of the said children. The Staines women and defendant have lived together about eight years. The house they occupied had two rooms. The witness had never seen the defendant and Hannah Staines in the same bed together. Defendant and the said Hannah moved from the witness's plantation in 1885, to a house about a mile and a half distant, where they continued to live together. The defendant has a living wife named Clarissa Webb, who lives about a mile and a half west from witness's place. Defendant worked for the witness after he moved from the plantation, and always came to work from the direction of the house occupied by him and the said Hannah. After working hours he always went back towards the house they occupied.

Hance Mirable testified, for the State, that he knew the defendant and Hannah Staines in 1885, and for several years prior thereto. During the said year 1885, defendant and Hannah lived together in a house on Mr. Hart's plantation. The witness often saw the defendant and Hannah together, both in the day time and in the night. Defendant had in 1885, and still has, a living wife, with whom, the witness had heard, he lived during the war.

Cash Hart, the son of the first witness, testified, for the State, that he knew the defendant in the year 1885, when he and Hannah and Ann Staines lived together in a house on the plantation of the witness's father. He did not know where the defendant or the Staines women slept. He had never heard defendant say that he was the father of any of the children born to Hannah or Ann Staines.

D. L. Neel testified, for the State, that he had known the defendant about twenty-five years. Defendant has a living wife, named Clarissa Webb, with whom he lived during the war. He separated from the said Clarissa some time after the war, and took up with Hannah Staines

The motion for new trial raised the questions discussed in the opinion.

No brief for the appellant.

Opinion of the court.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. To sustain a conviction for the offense of adultery, it is absolutely essential that the evidence should prove that at the time of the alleged adulterous intercourse, one of the parties thereto was lawfully married to some other person than the one with whom the adultery is charged.

In this case the defendant is the party who, it is alleged, was the married party. The only evidence that he was married is that he, at the time of the alleged adulterous acts, had a living wife, a woman with whom he had lived during the war, but from whom he had separated some time since the war, but at what date is not shown. There is not a particle of evidence that he ever *married* said woman, nor is there any evidence that they ever lived together as married persons. The witnesses say she was his *wife*, but none of them say he was married to her, or that he lived with her as married persons. His marriage with her was not proved by any of the modes prescribed by the statute. (Penal Code, art. 334.)

We do not think that the evidence sufficiently establishes that the defendant was married to another person. The mere opinion of witnesses that a woman was his wife can not be regarded as sufficient or even competent evidence to establish the important fact that he was married to another person. If the defendant and the woman named as his wife were emancipated slaves, they became lawfully married to each other at the date when the Constitution of 1869 took effect, if they were then living together as husband and wife; but, if not so living together at that date, their former *status*, whatever it might have been, would not make them married persons within the meaning of the law. (*Stewart v. The State*, 7 Texas Ct. App., 326.) There is nothing in the record before us to show that the parties were emancipated slaves, and were living together as married persons at the date of the adoption of the Constitution of 1869. The facts of the case, therefore, do not bring it within the purview of such a marriage.

Because, in our opinion, the evidence is insufficient to prove that the defendant was lawfully married to some other person than his co-defendant, at the time of the alleged adulterous acts, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered November 2, 1887.

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No. 2629.

24	167
28	348

DAVE LITTLEFIELD v. THE STATE.

1. **PERJURY—EVIDENCE.**—The prosecution in this case was for perjury committed upon the trial of one C. for burglary. The State was permitted to prove the testimony of the appellant before the grand jury upon the investigation of the charge against C., and his subsequent contradictory evidence upon the trial of C., and also his statements respecting the inducements under which he testified as he did upon the trial. *Held*, that the evidence was legitimate and was properly admitted.
2. **SAME—PRACTICE—CHARGE OF THE COURT.**—The trial court having admitted in evidence the indictment against C. for burglary, and the judgment rendered upon that trial, should, in the charge to the jury, have limited and restricted the jury to the legitimate purpose of such testimony. This omission in the charge was fatal error.

APPEAL from the District Court of Gonzales. Tried below before the Hon. George McCormick.

The conviction in this case was for perjury, and the penalty assessed was a term of seven years in the penitentiary.

The State first introduced B. R. Abernathy, who testified he was clerk of the district court of Gonzales county when Bob Carr was tried for burglary, and as such clerk he administered the oath to the witness who testified on that trial. The defendant was one of the witnesses who was sworn and he testified on that trial. Some time after the trial of Carr's case, and after this indictment was found, the witness, in conversation with the defendant about this case, asked him why he testified on the Carr trial as he did, and remarked that he ought to have kept out of such trouble. The defendant replied that Carr's friends got him drunk at the time of Carr's trial, and persuaded him to testify as he did. Witness had known the defendant a long time, and had often seen him when sober and when drunk. He was not under the influence of whisky when he testified on Carr's trial.

T. H. Spooner was the next witness for the State. He testified, in substance, that he was the district attorney of Gonzales county when the case against Carr for the burglary of the store of Brown & Peoples was tried. T. J. Ponton and W. S. Fly

Statement of the case.

were special prosecuting counsel in that case. Ponton conducted the examination of the witnesses for the State. The witness paid close attention to the testimony of all the witnesses as it was delivered. The witness knew as a fact that the defendant was sworn and testified as a witness for the defense on that trial. The witness knew also that the defendant was a witness before the grand jury when the burglary of Brown & Peoples's store was investigated, and that the defendant was specially interrogated before the grand jury as to Carr's probable connection with the burglary. He testified before that grand jury that he knew nothing about the said burglary; that, during the whole of the day previous to the burglary, he was at Albert Collins's house, killing hogs; that he went home at night, very tired, and lay down without eating supper, and went to sleep; that his wife woke him up for supper, and that he declined to eat supper because he had already eaten heartily of hog liver; that he then went to sleep, and did not leave his house until sun up on the next day, and did not see Carr during the said night which was the night of the burglary.

C. Littlefield and T. J. White, members of the grand jury which investigated the burglary of the store of Brown & Peoples, and which indicted Robert Carr for that offense, testified, for the State, substantially as did the witness Spooner as to the evidence of the defendant before the said grand jury. Littlefield testified, further, that he was present in the district court when Carr was tried for the said burglary, and heard the testimony of the several witnesses. The defendant, as a witness for the said Carr, testified on that trial, that he, this defendant, and Carr, the defendant in that trial, and one Joe Askey, played cards all night long on the night of the burglary, in the house of one James Collins; that they commenced playing before sun down, and played continuously until the next morning, and that Carr did not leave Collins's house on that night, and could not have been at the store of Brown & Peoples when it was burglarized. Messrs. Ponton & Fly, private prosecutors on the trial of Carr, testified substantially as did C. Littlefield, as to what the defendant testified on that trial.

The State next introduced in evidence the indictment against Carr for the burglary of the store house of Brown & Peoples, and the judgment of conviction rendered upon the verdict returned upon the trial of the said Carr.

Albert Collins testified, for the State, that the defendant came

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to his house early on the day before the burglary of Brown & Peoples's store, and helped him to kill hogs. He worked with witness until night, when he went off, saying that he was going home. He returned early on the next day, and helped witness salt the meat.

The motion for new trial raised the questions discussed in the opinion.

No brief for the appellant.

Walter Weaver, for the State.

WHITE, PRESIDING JUDGE. Appellant was convicted in the lower court upon an indictment charging him with having committed perjury as a witness on the trial of one Carr in the district court for the crime of burglary. Only two of the several questions presented are deemed worthy of notice.

Several witnesses were introduced by the prosecution, and over objection of defendant were permitted to prove statements and declarations made by defendant before the grand jury, where he appeared as a witness at the time they were investigating the Carr case, and subsequently to the trial in said case, with reference to the reasons and inducements which actuated him to testify as he did on said trial. This testimony was legitimate upon the issue being tried, to wit, perjury in the Carr case, and tended to prove said perjury by showing contradictory evidence in the grand jury to that given by defendant at the trial in the district court, and also statements tantamount to admissions that his evidence in Carr's case in the district court was not the truth. It was properly admitted.

Upon the other question, counsel representing the State on this appeal admits that the error complained of is well assigned under previous adjudications. It is this: On the trial the State introduced in evidence the indictment and judgment in the Carr burglary case, wherein it was charged that appellant committed the perjury in this case. In the charge to the jury the court failed and omitted to limit and restrict the jury as to the legitimate purposes of this testimony. This was fatal error. (*Davidson v. The State*, 22 Texas Ct. App., 373; *Washington v. The State*, 23 Texas Ct. App., 336; *Maines v. The State*, Id., 568.)

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered November 2, 1887.

Statement of the case.

24 170
32 229

No. 2671.

ED BROWN v. THE STATE.

1. **PERJURY—INDICTMENT.**—See the opinion in extenso for the substance of an indictment *held* sufficient to charge the offense of perjury.
2. **SAME—EVIDENCE—CHARGE OF THE COURT—CASE STATED.**—The prosecution in this case was for perjury, alleged to have been committed by the accused when he testified at the trial of one Williams for assault to murder. Upon the introduction of one Moore as a witness for the defense, in the present case, the State offered, and was permitted, over the defendant's objection, to read in evidence an indictment then pending against the said Moore, wherein the said Moore was charged with perjury upon the same trial as that in which the defendant is charged to have committed perjury. *Held* that, though the indictment was not admissible to impeach Moore's competency as a witness, it was admissible as matter going directly to his credibility, and as tending to show a motive for his testimony in this particular case. Being admissible for these purposes, it was not incumbent on the trial judge, in his charge, to limit and restrict it, inasmuch as it did not tend to exercise a wrong, undue or improper influence upon the jury as to the main issue.
3. **SAME—FACT CASE.**—See the statement of the case for evidence which, though conflicting, satisfied the jury, whose province it was to determine its weight and credibility, and is *held* sufficient to support a conviction for perjury.

APPEAL from the District Court of Falls. Tried below before the Hon. Eugene Williams.

The conviction in this case was for perjury, alleged to have been committed by the appellant, upon the trial of one Guy Williams for assault to murder. The penalty imposed by the verdict was a term of five years in the penitentiary. The brief of counsel for the appellant shows the objections urged against the sufficiency of the indictment, which covers nine pages of the transcript.

Charles H. Bartlett was the first witness for the State. He testified, in substance, that he was the clerk of the district court of Falls county, Texas, at the July term, 1886, of the said court. That term of the said district court included the fourth day of August, 1886, on which day the case of the State of Texas v. Guy Williams, charged with an assault with intent to murder one George H. Gassaway, was tried. The witness remembered that

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his only deputy, Zenas Bartlett, did not officiate in the proceedings of the court during that term, and that he himself attended alone upon the court at that term. He remembered distinctly that he administered the oath to the main body of the witnesses in the Williams case, when they were called to the bar, at the beginning of the trial. He could not say that the defendant was among the main body of witnesses so sworn by him; nor did he have any recollection of administering the oath to the defendant separately. But he did distinctly remember that the defendant testified in behalf of the said Williams on that trial.

Z. D. Harlan testified, for the State, that he was one of the counsel for the State who prosecuted the case against Guy Williams for assault to murder Gassaway. As such counsel, he was present on the fourth day of August, 1886, when the case was tried, and observed all the proceedings and heard all the evidence adduced in the case. He remembered that the main body of the witnesses were called to the bar at the beginning of the trial, and were sworn, but could not remember that the defendant was among the main body. He could not remember who administered the oath, independent of his recollection that District Clerk C. H. Bartlett did all the work of his office in the court room during that term. He remembered that the defendant testified on that trial, as a witness on behalf of Williams. The substance of the defendant's testimony on that trial was that he was standing in the south door of Simon's saloon when the alleged assault upon Gassaway was made by the said Williams; that he saw the said Williams enter the said saloon with a gun under his arm, and walk towards where Gassaway, talking to another man, was leaning against a billiard table about midway between the north and south extremes of the saloon; that Williams stopped near Gassaway, who was looking south, and said to him: "I heard that you called me a God d—d son of a bitch;" that Williams was then holding his gun under his arm, with the muzzle pointing towards the floor; that Gassaway then attempted to draw a pistol from his breast; that he, defendant, saw a part of the pistol, the handle of which he described by color; that before Gassaway could get his pistol out, Williams raised his gun and covered Gassaway with it, and told Gassaway that if he drew a weapon he, Williams, would kill him; that about that time Clark Williams came in, seized Guy Williams, and conducted him out of the saloon. The witness did not think that the defendant, in his said testimony, claimed to have been pres-

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ent at Simon's saloon throughout the entire difficulty between Williams and Gassaway.

B. B. Clarkson, the next witness for the State, testified that he assisted the witness Harlan in the prosecution of Williams for the murderous assault upon Gassaway, but had no recollection of the defendant's testifying upon that trial.

J. R. Dickinson testified, for the State, that he was an attorney at law, and represented Guy Williams upon his trial in the district court of Falls county, in August, 1886, for a murderous assault upon Gassaway. He remembered distinctly that the defendant testified for Williams on that trial, and that his testimony was substantially as the witness Harlan had related it. Independent of the fact that defendant testified without objection, the witness had no recollection that he was sworn as a witness.

G. H. Gassaway was the next witness for the State. He testified that he was the individual upon whom Guy Williams was charged to have committed the murderous assault on December 23, 1885, in Simon's saloon, in Marlin; and for which the said Williams was tried in the district court of Falls county on the fourth day of August, 1886. He attended the said trial of Williams as a witness, but, being under the rule with other witnesses, he did not hear the defendant testify. The witness stated that he was in Henry Simon's saloon, in Marlin, Falls county, Texas, on the twenty-third day of December, 1885. While leaning against a billiard table in that saloon, facing south, and talking over a business matter with a Mr. Story, his attention was attracted by the clicking of the hammers of a gun. As he turned his head, Guy Williams, who had then reached a point nearly in front of witness, threw his gun down on witness, and said with an oath that he was going to kill witness. Witness replied: "I reckon not." About that time, and while Guy Williams still held the gun on witness, Clark Williams entered the saloon, seized Guy Williams with one hand, and the gun with the other, and took Guy and his gun out of the saloon. The witness did not change his position while Williams had him covered with his gun, except to turn his head when he heard the clicking of the gun hammers. The witness then had no pistol on his person, nor did he make a motion as if to draw one from his breast or elsewhere about his person.

Cross examined, this witness reiterated, with great positiveness and emphasis, that he had no pistol of any kind on his

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person when he was assaulted by Guy Williams; that he did not make a demonstration with either of his hands as if to get a weapon of any kind from his breast or elsewhere, and that, in fact, he did not even move his hands while he was covered with the gun held in Williams's hands, nor did he advance a step or a fraction of a step on Williams. At this point the witness was asked if it was not a fact that, when Williams, when he entered Simon's saloon, said to witness: "Mr. Gassaway, I heard that you called me a d—d son of a bitch, and that you said that you was going to kill me if it cost you a hundred thousand dollars," and that he replied to Williams: "What if I did," and that he then placed his hand in his bosom and partly drew out a white handled pistol, displaying the handle, and if Williams did not then cover him with the gun, and tell him that he would kill him if he did not put the pistol back?" To this question the witness replied with a positive denial. He stated that he was as positive that he did not place his hand to his breast, as he was that he did not partially draw a pistol and expose the handle, and that he had no pistol on his person. The witness at the time he was assaulted by Williams, owned a white handled revolver pistol, but did not have it on his person that day. Witness had eaten his dinner when the assault was made upon him by Williams, and had taken one drink of whisky.

James Storey was the next witness for the State. He testified that he witnessed in part the assault made on Gassaway by Guy Williams, in Simon's saloon, in December, 1885. He was standing at the billiard table, facing north, talking to Gassaway when Williams entered the saloon, confronted Gassaway, covered him with his gun and said to him: "I heard you have cursed me for a God d—d son of a bitch." Witness immediately left, and went to the front door. About that time a black negro entered the saloon, seized Williams, and took him, with the gun, out of the saloon. Gassaway made no attempt to draw a weapon from his bosom or elsewhere, up to the time witness left the billiard table and went to the door, nor did he, during that time, expose any part of a pistol, nor did he move from his position at the billiard table during the difficulty. Witness did not hear Williams threaten, by word, to kill Gassaway, but did hear him tell Gassaway not to move.

Henry Simon, the proprietor of Simon's saloon, was the next witness for the State. He testified that he was in his saloon, behind his counter, on the day in December, 1885, when Guy

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Williams drew a gun on Gassaway. While Gassaway and Storey were standing at the billiard table talking, Williams entered the saloon at the front door, armed with a gun. He walked up to Gassaway, touched him, and said to him: "You cursed me for a d—d son of a bitch; if you move I will blow your brains out." Gassaway was leaning on the billiard table, and was facing south, until Williams touched and spoke to him, when he turned and faced Williams and the north and said: "Well, I will not move." Gassaway made no motion of his hand to his breast, after he turned and faced the north, nor did he expose a pistol. If he made a motion with his hand or exposed a pistol before he turned his face from the south to the north, the witness, who was looking from the north, could not have seen it. The defendant may possibly have been in the saloon during the difficulty, but if he was the witness did not see him. There were quite a number of persons in the saloon at that time.

Will Nicholson testified, for the State, that he was engaged behind Simon's bar at the time of the assault upon Gassaway by Williams. From his position at the time he could see what occurred, but could not hear what was said. He saw Williams go up to and cover Gassaway with his gun. Gassaway did not partially draw and expose a pistol, nor did he make any demonstration with his hand as if to draw a weapon from his bosom or elsewhere on his person. It was possible for the defendant to have been in the saloon during the difficulty, but if he was, the witness did not see him.

Clark Williams, the step father of Guy Williams, testified for the State, that he did not see the beginning of the difficulty between Gassaway and Guy Williams in December, 1885, but entered the saloon after he was informed that trouble was imminent. He found Guy Williams in that saloon with his gun drawn on Gassaway. He knocked the gun up and seized Guy, whom he took out of the house. Gassaway did not draw or attempt to draw a pistol while witness was in the saloon. The witness was a witness on the trial of Guy Williams, and, pending that trial, was under the rule with the other witnesses in the case. The defendant was a witness under the rule with him, but witness could not remember that he saw the defendant sworn.

Henry Lard testified, for the State, that he was in Simon's saloon at the time of the difficulty between Gassaway and Guy Williams. He could not see the row from the position he occupied, but saw Clark Williams take Guy out of the house. If the

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defendant, whom witness knew well, was among the large number of people in the saloon at that time, witness did not see him.

The State next introduced in evidence the indictment against Guy Williams, charging him with assault to murder G. H. Gassaway, the judgment rendered thereon, and the subpoena for the defendant as a witness for the said Guy Williams.

State closed.

Billy Graves and Alex. McDonald, witnesses for the defense, concurred in their testimony that they were in the Simon saloon at the time of the difficulty between Gassaway and Guy Williams. Their attention was attracted by Guy Williams, who approached Gassaway and demanded that he retract some remark about him, Williams, made by the said Gassaway. The witness then saw Gassaway put his hand about his vest pocket and make a movement towards Williams, when Williams covered him with his gun. The witness did not see a pistol, nor the part of a pistol on Gassaway's person.

William Moore, the defendant's half brother, testified for the defense, that he was in Simon's saloon, and witnessed the difficulty between Gassaway and Guy Williams. While he was standing at the bar, facing Mr. Simon and Mr. Nicholson, one or the other of whom was filling a bucket with beer for him, he saw Guy Williams enter the front door, carrying his gun with the stock under his arm and the muzzle pointing towards the floor. Williams, carrying his gun as stated, went up to Gassaway, who was leaning over a billiard table talking to another man, and told him to take something back. Witness could not hear what was said by the parties, but saw Williams draw his gun on Gassaway when Gassaway thrust his hand in his breast pocket and drew a pistol far enough out for the witness to see the white handle of it. Williams told Gassaway not to draw that pistol or he would shoot him.

On his cross examination the witness stated that after Clark Williams came in, and while Clark was taking Guy out, Gassaway followed Clark and Guy, and said something to the effect that they had better take Guy out. When Gassaway got nearly to the back door, following Clark and Guy, he took his pistol entirely out and held it in his hand, and witness saw that it was a white handled revolver. Witness followed Clark and Guy, and, before he got out of the saloon, he passed and spoke to Gassaway.

Guy Williams testified, for the defense, that he was the party

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who had the difficulty with Mr. Gassaway in Simon's saloon, in December, 1885, and who was tried for that offense in August, 1886. That indictment was still pending against him. The witness went into Simon's saloon on that day to find Mr. Gassaway. He took his gun with him, and carried it with the stock under his arm, and the muzzle extending towards the floor. He found Mr. Gassaway engaged in a game of billiards, with a billiard cue in his hand. Witness touched Gassaway on the shoulder and said to him: "Mr. Gassaway, did you not, when I passed you on the street, say that I was a God d—d son of a bitch, and that you would kill me within twenty-four hours if it cost you a hundred thousand dollars?" Mr. Gassaway replied: "What if I did? What are you going to do about it?" Witness then said to Gassaway: "If you intend to kill me, I think the law allows me to protect myself, and I will not give you a chance to kill me." Thereupon Gassaway began to unbutton his vest. When he got several buttons loose he thrust his hand in his bosom, and partially drew out something which the witness took to be a white handled pistol. Witness could not see enough of the white object to be able to swear positively that it was a pistol, but he took it to be a pistol, and acting upon that belief, he covered Gassaway with his gun and told him that he would kill him if he drew that pistol. Witness then turned to leave, when Gassaway applied some epithet to him. Witness turned immediately, and, thinking that Gassaway had his pistol entirely out and in his hand, again presented his gun. About this time Clark Williams came in, seized witness and pushed him out of the saloon through the back door. While being pressed out, witness called to the parties not to disarm him, as he feared Gassaway would shoot him with the pistol. Gassaway had the billiard cue in his hand when the witness first drew his gun on him. Witness did not know when Gassaway put the cue down.

John Jackson and Tom Soders, witnesses for the defense, testified that they saw the defendant in the town of Marlin on the day of the difficulty between Gassaway and Williams, but neither of them saw him in Simon's saloon.

The defense closed.

George H. Gassaway, recalled by the State, testified, in rebuttal, that he did not follow Clark and Guy Williams as far as the back door when the latter was being taken out by the former, nor did he draw a pistol at or near the back door, nor elsewhere in that saloon on that day, either before or after the

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arrival of Clark Williams. As soon as Clark Williams took Guy out of the saloon, witness left the saloon through the front door, and went across the street to King's saloon, and thence home.

Clark Williams testified, for the State, in rebuttal, that he did not, while taking Guy Williams out of the saloon, hear the said Guy ask him or anybody else not to take his gun from him, or say that he was afraid that Gassaway would shoot him "with that pistol." Guy said: "Don't take my gun; Gassaway will shoot me."

Alex. McDonald testified, for the State, in rebuttal, that Gassaway followed Clark and Guy Williams a short way towards the back door, and then paced the room crosswise, "fumbling" about his vest pocket in an angry manner. Gassaway pulled no pistol then nor at any other time in the saloon, so far as the witness knew or saw.

Henry Simon testified, for the State, in rebuttal, that he saw William Moore at the show case in the front of the saloon while the row between Gassaway and Guy Williams was in progress. Moore followed Clark and Guy to and out of the back door. Gassaway remained in the saloon for some time after the difficulty.

The State closed the case by introducing in evidence an indictment charging the witness William Moore with perjury committed by him as a witness for the defense in the case of *The State of Texas v. Guy Williams*, for assault with intent to murder George H. Gassaway.

The motion for new trial raised the questions discussed in the opinion.

Alexander, Winter & Dickinson, for the appellant: The court erred in overruling defendant's special exceptions to the indictment, based upon the last two assignments of perjury made therein, the ground of the exceptions being that the facts assigned as perjury differ in the statement of them and in their legal import from the facts testified to by defendant; as alleged in the indictment.

The truth of the alleged statement made by one charged with perjury must be expressly negatived, and an assignment as perjury of facts which differ materially from the facts stated by the accused in their legal import is bad.

A statement that witness saw W. holding his gun with the muzzle down in the direction of G., and that at the time the said

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W. was so holding the gun, witness saw G. have a pistol in his breast, and saw him try to get it out; that he saw G. pull the same out and present it upon W. in a threatening manner, will not support a traverse as follows: "Whereas, in fact said witness never saw G. with a pistol at the time W. was making an assault upon G. with a gun," or as follows: "Whereas, in fact said G., at the time said W. was making an assault upon him with a gun, never had a pistol of any kind."

The indictment alleged that the defendant did "testify that on the evening of December 23, 1885, he was in the back part of the saloon of one Henry Simon, in the town of Marlin, when a difficulty occurred between George H. Gassaway and Guy Williams, and that he was present all the time looking at the same; that he saw them standing near each other; near a billiard table in said saloon; and that he saw Guy Williams holding his gun, with the muzzle down, in the direction of Gassaway; and that at the time that the said Guy Williams was so holding his gun, he (the said Ed. Brown) saw the said Gassaway have a pistol in his breast, and saw him try to get the same out; that he saw the said Gassaway pull the same out and present it upon the said Guy Williams." The foregoing are all the facts alleged in the indictment as having been sworn to by defendant. The indictment, among others, contains the following assignments of perjury: "Whereas, in truth and fact, the said Ed. Brown never saw George H. Gassaway with a pistol on the evening of the twenty-third of December, 1885, at the saloon of Henry Simon, in Marlin, Falls county, Texas, at the time that the said Guy Williams was making an assault upon the said Gassaway with a gun; whereas, in truth and in fact, the said George H. Gassaway, at the time that the said Guy Williams was making an assault upon him with a gun on the evening of the twenty-third of December, 1885, in the saloon of Henry Simon, in Falls county, Texas, never had a pistol of any kind."

Appellant excepted to these assignments in the indictment on the ground that "it does not appear from said alleged testimony that said Guy Williams, at the time spoken of by defendant, was making an assault upon the said Gassaway, nor does it appear, by averment or otherwise in said indictment, that the time referred to in said assignment of perjury is the same time referred to by defendant in his alleged testimony." Appellant's exception was overruled and bill reserved. (*Gabrielsky v. The State*, 13 Texas Ct. App., 436; *Massie v. The State*, 5 Texas Ct.

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App., 81; Martinez v. The State, 7 Texas Ct. App., 394; Rohrer v. The State, 13 Texas Ct. App., 166; Donahoe v. The State, 14 Texas Ct. App., 652; Hernandez v. The State, 18 Texas Ct. App., 134.)

The court erred in permitting the State, over the objection of defendant, to introduce in evidence the indictment in cause No. 1923, styled The State of Texas v. William Moore, in that said indictment was incompetent testimony, and calculated to prejudice defendant's cause. If the object of the evidence was to impeach the witness Moore, it was not competent even for that purpose, and it was not competent for any other purpose.

Indictment 1923, The State v. William Moore, charges William Moore with perjury committed on the trial of Guy Williams, on August 3, 1886, and his testimony, assigned as perjury in the indictment, is substantially like the assigned false testimony in the case at bar. The circumstances of the admission of the indictment as evidence, we give in the language of the trial judge.

"As to the indictment against the witness, Wm. Moore, the facts are: That the county attorney began to discuss the credibility of the witness on the ground that he was indicted for a similar offense involving the same transaction. The defendant objected, on the ground that it had not been proved that the witness was so indicted. The State contended that the bill of indictment had been introduced. The court held that it had not been. The county attorney then offered to introduce it, to which the defendant objected. The court overruled the objection and granted the State leave to introduce the indictment; it was considered in evidence, but not read to the court or jury. The county attorney stated that it was an indictment for perjury, based on the same transaction with the case on trial, and argued the bearing of this prosecution on the credibility of the witness Moore. This was the only mention made of the indictment, and went to the jury on the issue of the credibility of the witness. To all of this proceeding the defendant then and there objected." (Clark v. The State, 18 Texas Ct. App., 472; McGuire v. The State, 10 Texas Ct. App., 126; Fore v. The State, 5 Texas Ct. App., 253; Harper v. The State, 11 Texas Ct. App., 26; Heard v. The State, 9 Texas Ct. App., 22; Long v. The State, 17 Texas Ct. App., 130; Chumley v. The State, 20 Texas Ct. App., 556.)

The second paragraph of the charge did not follow the assignment of perjury made in the indictment. The indictment charges that, in truth, Gassaway did not have a pistol, and de-

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fendant did not see him with one while Williams was making an assault on him with a gun. The charge is: "If the jury believe the defendant testified * * * that he saw Gassaway with a pistol at the time Williams was holding his gun with the muzzle down, and that, at the time said Williams was so holding said gun, said Gassaway had a pistol * * * they would find defendant guilty.

The court erred in failing to instruct the jury, limiting the purpose for which the indictment against William Moore, given in evidence by the State, might be considered. William Moore, a witness for appellant, was also indicted for perjury, alleged to have been committed on the trial of Guy Williams for an assault with intent to murder George Gassaway. The indictment against Moore was introduced by the State as evidence. No charge was given relative to this testimony. (*Davidson v. The State*, 20 Texas Ct. App., 382; *Tyler v. The State*, 13 Texas Ct. App., 205; *McCall v. The State*, 14 Texas Ct. App., 353.)

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. The conviction in the lower court was for perjury, predicated upon testimony given by defendant as a witness on the trial of one Guy Williams for assault with intent to murder.

Exceptions were made to the sufficiency of the indictment, and they are again insisted upon on this appeal. We are of the opinion, after close scrutiny of the allegations, that they are sufficient even though the pleader has made his assignment to hinge unnecessarily close to statements made by defendant with regard to an *assault* by Williams upon one Gassaway. The excerpt from defendant's testimony, as set forth, and upon which the perjury is assigned, though not saying in terms that Williams was making an assault, shows facts constituting an assault. He says "he saw" the parties, Williams and Gassaway, "standing near each other, near a billiard table, in said saloon, and that he saw Guy Williams holding his gun *with the muzzle down in the direction of Gassaway*." If the parties were close together, and Williams was holding the gun with the muzzle in the direction of Gassaway, we think it is equivalent to saying that he was pointing the gun at Gassaway; which sufficiently charges an assault in so far as necessary to be charged in connection with the other allegations in the indictment.

Syllabus.

It was competent to introduce a pending indictment for perjury against defendant's witness Moore, based upon the same transaction out of which this prosecution grew, not, indeed, as to his competency, but as matter going directly to his credibility with the jury in this case. It tended to show the motives for the witness's testimony in this particular matter. For the purpose for which it was thus admitted and admissible, it was not incumbent upon the court specially to limit and restrict its purposes in the charge, because the evidence in no manner tended to exercise a wrong, undue or improper influence upon the jury as to the main issue. (*Davidson v. The State*, 22 Texas Ct. App., 373.) This evidence did not fall within the rule which requires of the court that it should be limited and restricted. Notwithstanding the criticisms made by counsel upon the charge of the court, we think it is substantially and sufficiently applicable to the facts, and presented the law fairly upon the issues made.

As to the sufficiency of the evidence, suffice it to say that it is conflicting and its weight and credibility were peculiarly within the province of the jury to determine, and, if they believed the State's witnesses, then the case was fully made out.

Our examination of the record has furnished us with no reason demanding a reversal of the judgment, and it is therefore affirmed.

Affirmed.

Opinion delivered November 2, 1887.

No. 2581.

GREEN MASSENGALE v. THE STATE.

1. **MURDER—INSANITY—CHARGE OF THE COURT.**—Upon the issue of insanity interposed as a defense to a prosecution for murder, the trial court, after having instructed the jury that every man is supposed to be sane and responsible for his acts, until the contrary is shown to the satisfaction of the jury, instructed them in a subsequent paragraph that the burden of proof was upon the defendant to establish his insanity. The objection urged is that the paragraphs referred to make the presumption of sanity, and the burden of proving insanity too prominent. *Held*, that the objection is without merit, in view of the entire charge.

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2. **SAME—VERDICT.**—Article 722 of the Code of Criminal Procedure, which provides that “when the defendant is acquitted on the ground of insanity, the jury shall so state in their verdict,” is merely directory; and though its substance should be charged by the trial court in all cases involving the issue of insanity, still the omission to so charge, if without apparent injury to the accused, is not material error.
3. **SAME—FACT CASE.**—See the opinion in *extenso*, for the substance of evidence held sufficient to establish the insanity of the accused, and, therefore, insufficient to support a conviction for murder.

APPEAL from the District Court of Robertson. Tried below before the Hon. W. E. Collard.

The death penalty was assessed against the appellant upon his conviction in the first degree, for the murder of John Mitchell, in Robertson county, Texas, on the twenty-sixth day of April, 1887.

The counsel for the appellant has prefaced his able and interesting argument upon the issue of insanity with a statement of the facts as full and concise as can be made from the record.

John E. Crawford, for the appellant: On the twenty-sixth day of April, 1887, the deceased, John Mitchell, the appellant and the principal State witness, Bob Massengale, appellant's brother, were planting cotton in the south field of Mr. Ben. Wheelis, about six miles northeasterly from Calvert in Robertson county, Texas, the two Massengales being hired hands working for Mitchell. Mitchell with a mule and plow was opening the ground; appellant with a sack of seed was following Mitchell planting, and the witness, Bob, with a mule and log was covering the seed. About ten o'clock in the morning Mitchell remarked to appellant that appellant was leaving too many skips in planting the seed. Appellant made no response, but about half an hour afterwards laid down his sack and went to the house, a few hundred yards away. Mitchell told witness to take appellant's sack and plant until appellant returned, which witness Bob did.

In a short while appellant returned and when within fifty yards of Bob and Mitchell (who were planting, going towards appellant, and appellant coming from the house meeting them) Bob saw a pistol in appellant's hand and asked Mitchell what appellant was going to do with that pistol. Mitchell replied: “I do not know; he must be crazy.” Appellant came on up muttering and “rolling out the dams,” and Mitchell ran around

Argument for the appellant.

his mule—appellant after him. The mule ran away and Mitchell ran from appellant and appellant ran after him about one hundred yards. Mitchell stopped and threw his hands up over his head, and appellant, being within five or six steps of Mitchell shot him in the left side of the head, the ball ranging downward. Mitchell fell and appellant walked off in a northerly direction towards the lane and public road. Mitchell got up and walked nearly to the house and was met by Mr. Ben Wheelis, his step-father, and assisted to the house. The lane and public road runs in front of the house on the south, and the south field where the parties were is across the lane from the house.

Appellant occupied a tenant house one hundred and twenty-five yards from the big house where Mitchell lived. This lane is the public road leading to Calvert, six miles distant, and the lane extends three miles from this house.

About three and one-half hours after the tragedy Mr. Ben Wheelis got in his buggy and started to Calvert after his wife, who was Mitchell's mother. About two and one-fourth miles from the house Wheelis met appellant in the lane and public road coming along, walking, from towards Calvert, and going towards where the tragedy occurred nearly four hours before. Wheelis spoke to appellant, but did not stop. Appellant said good evening as though nothing had happened, and passed on by Wheelis. Wheelis said to appellant: "Which way, Green?" Appellant replied, "I am going up the road," or something to that effect. This was nearly or about four hours after the tragedy, and was two and one-fourth miles from where it occurred, and three and three-fourth miles from Calvert, on a public highway and in a very thickly settled neighborhood. Wheelis drove on to Calvert, got his wife and came back, and again saw appellant about one and one-fourth miles from where he first met him. Appellant had turned out of the main road into an old road, and was about one hundred yards from the main public road and about the same distance from a house where some people lived. Wheelis said nothing to appellant this time, but went on to where Mitchell was.

The same evening about dark, Wheelis and Dick Brock were informed that appellant was in his house about one hundred and twenty-five yards distant from where Mitchell was at the big house, and Mr. Wheelis and Brock repaired to appellant's house to arrest him. The door was closed and they hailed at the door and heard appellant get off his bed as though he was lying down.

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Appellant came to the door and opened it, when he was confronted by Mr. Wheelis with upraised gun. Appellant at first drew back a little but immediately came on out and walked in the face of guns and pistols directly up to Mr. Brock, who had his pistol in his right hand, and appellant gently took hold of Brock's left arm above the elbow, the appellant at the same time beating himself in the breast and praying. Appellant made no resistance and no attempt at escape, but was tied by Wheelis and Brock and carried to jail. Mitchell lived about one month and died from the effects of the shot.

Bob Massengale, the principal State's witness, on cross examination testified that for seven or eight months before the tragedy he had noticed a marked change in the mental condition and conduct of appellant; that appellant seemed depressed, with his head hung down, in a deep study, was absent minded, refused to talk, and sometimes when appellant would be laying off rows with a plow he would run one row clear across another and would not seem to know the mistake, and sometimes when directed to put manure around the hills of corn a certain distance on the rows, would go clear through to the end without stopping at the place where directed to stop, and would not seem to notice his mistake.

The above is a synopsis of the State's evidence.

The attorney appointed by the court to represent appellant interposed the plea of insanity, and the following is a synopsis of the evidence developed for the defense:

The witnesses for the State and appellant generally agreed that for several months before the homicide that the rumor was general in the neighborhood that appellant was going crazy. The following is evidence of acts and conduct of appellant prior to the tragedy:

Dick Brock met appellant on one occasion in a lane; appellant was walking, and before he got to Brock appellant climbed over a high fence and "shunned" around Brock, and after he had passed climbed back over the fence into the road again. On another occasion Brock saw appellant helping deceased kill hogs. Appellant seemed low spirited, seemed to be in a deep study, kept his head hung down, would not talk, and did everything in a mechanical manner. Witness remarked to appellant that he had heard that he (appellant) was going crazy. Appellant made no response. On another occasion appellant came to witness's house and acted very peculiarly; would not talk fur-

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ther than to answer questions; seemed to be in dread. Witness noticed a change in appellant's conduct and mental condition from what it formerly had been.

Caroline Massengale, the mother of the appellant, testified that for some months before the homicide appellant refused to drink water out of the same bucket where the balance of the family drank, and would not eat with the family, but would cook his own victuals, go into a separate room, close the door and eat alone, and after finishing would scatter the fragments all over the room; and that appellant seemed droopy, would not talk, and on one occasion witness saw appellant sitting in his room on the side of the bed with his left hand partly raised and rapidly picking at the back of his left hand with the ends of his fingers of his right hand, and at the same time continually spitting, and seemed in a state of oblivion. At another time appellant fell down on the floor with something like a spasm. On one occasion appellant was seen going by the house of Wesley Bennett, walking with his hat in his hand; Bennett hailed appellant loud enough to be heard twice the distance, but appellant paid no attention to him. On another occasion appellant was passing the gin where Cal Murray was at work, and Murray went out to the road and tried to get into a conversation with appellant, but appellant refused to stop or talk. Albert Berkshire and Phillis Douglas testified to similar conduct.

It was proved by a number of respectable witnesses, and not denied or attempted to be controverted by the State, that appellant had, prior to the homicide, always borne the general reputation of a peaceable and quiet citizen, and was never known to have a difficulty before.

I insist that the court erred in not granting appellant a new trial because the existence of express malice was not proved beyond a reasonable doubt, and the proof of express malice is not sufficient to warrant a conviction of murder in the first degree.

The rule is that the existence of express malice must be clearly proved by the State, as any other fact, beyond a reasonable doubt in order to warrant a conviction of murder in the first degree. "While the law implies malice on proof of voluntary homicide, it does not impute express malice." (Farrar's case, 42 Texas, 272; Murray's case, 1 Texas Ct. App., 422; McCoy's case, 25 Texas, 33.)

The law governing the defense of insanity has been thoroughly and ably discussed by our present Court of Appeals in quite a

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number of elaborate and learned opinions, in some of which the court has affirmed judgments of conviction for murder wherein the plea of insanity was interposed and not a little evidence adduced in support of the same. But from a hurried perusal of those cases we find this difference: that this case is most peculiar as to the manner of the homicide and the conduct of the appellant at the time and immediately after the act, and presents a most remarkable *absence* of any *motive* on the part of appellant to kill the deceased, and as the jury have shut their eyes and closed the doors of their hearts against our theory of the case, and have assessed the extreme penalty of death, this is perhaps sufficient apology for again presenting these questions for the most careful consideration of our criminal court of last resort.

My position is this: The remarkable circumstance of this homicide, with no provocation, no former difficulty, no former grudge, no threats, absolutely *no motive nor cause*, the manner of the killing in wildly running after deceased, the very peculiar conduct of appellant immediately afterwards in loitering along a public highway in a densely settled neighborhood near the scene of the tragedy, during the whole day after the shooting; his meeting Mr. Wheelis and his conduct at the time as though nothing had happened; his coming back to his room on the same premises only one hundred and twenty-five yards from where deceased was; his closing the door and laying down on the bed; his peculiar conduct when arrested in beating himself on the breast and praying and strangely taking hold of Brock's arm; no effort to escape; no resistance to the arrest, together with the fact that for several months prior to the tragedy there was a general rumor in the neighborhood that appellant was going crazy. (Which shows that it is no afterthought.) His peculiar conduct on different occasions as narrated by different witnesses, his refusing to talk, his oblivious moods, his droopy spirits, his refusing to eat and drink with others, his undenied reputation for peace and quiet, taken altogether and considered as an entirety, overwhelmingly rebut any proof of express malice, if in fact there is any such proof in the record, and as matter of law reduces the homicide to murder in the second degree, even upon the theory that the jury were right in finding that the insanity of appellant was not established by a preponderance of evidence, and that he should be punished.

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Dr. Taylor, in his work on medical jurisprudence, speaking of homicidal insanity, says:

"Sometimes the impulse is long felt, but concealed and restrained. There may be merely signs of depression and melancholy, low spirits and loss of appetite, as well as eccentric or wayward habits, but nothing to lead to a suspicion of the fearful contention which may be going on within the mind. As in suicidal mania, many of those who are in habits of daily intercourse with the patients have been first astounded by the act of murder, and then only for the first time led to conjecture that certain peculiarities of language or conduct, scarcely noticed at the time, must have been symptoms of insanity.

"Occasionally the act of murder is perpetrated with great deliberation, and apparently with all the marks of sanity. These cases are rendered difficult by the fact that there may be no distinct proof of the existence, past or present, of any disorder of the mind; so that the chief evidence of mental disorder is the act itself." (Taylor's Med. Juris., 7th Amer. Ed., 784.)

The same writer says: "The existence of a morbid delusion can not always be allowed to screen a criminal from the consequences of his own acts, while, on the other hand, there are instances in which a plea of insanity may properly be allowed, although no delusion can be proved. Each case must be taken with all its surrounding circumstances, and legal theories of insanity are chiefly valuable, not as rigorous axioms of law, but as cautions to be observed by the jury." (Id., 782.)

This writer further says: "And if the rule suggested, that a person, in order to be acquitted on the ground of insanity, should be first proved to be as unconscious of his act as a baby, were strictly carried out, there is scarcely an inmate of an asylum, who happened to destroy a keeper or an attendant, who might not be executed for murder. Such a rule amounts to a *reductio ad absurdum*; it would abolish all distinction between the sane and the insane, between the responsible and the irresponsible; and it would consign to the same punishment the confirmed lunatic and the sane criminal." (Id., 783.)

A reference to the reported cases decided by our Court of Appeals, wherein the plea of insanity was interposed as a defense to murder, will show that each case presents unmistakable evidence of express malice and a motive for the homicide. (Webb v. The State, 5 Texas Ct. App., 596; and 9 Texas Ct. App., 490.) The appellant said deceased had done him dirt, and that he had

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given deceased fourteen days to settle with him; hence he killed him, shooting deceased three times. The conviction was only for murder in the second degree. There was also some whisky mixed with the insanity.

In the case of *McClackey v. State*, 5 Texas Court of Appeals, 320, there is evidence of waylaying and of a former difficulty, and that the parties were deadly enemies. The conviction was for murder in the second degree.

In the case of *Williams v. The State*, 7 Texas Court of Appeals, 163, the evidence clearly showed that appellant charged criminal intimacy between deceased and the wife of appellant. Thus jealousy, the strongest motive known to the human heart, actuated appellant to commit the murder, and the conviction was for murder in the first degree, with death penalty.

In *Clark v. State*, 8 Texas Court of Appeals, 350, the evidence clearly shows that the cause of the homicide was adulterous intercourse between deceased and the wife of appellant. The conviction was second degree.

In the leading case of *King v. State*, 9 Texas Court of Appeals, 515, and reported again in 13 Id., 277, the evidence of express malice is strong. The deceased had filed two charges for libel against the accused. The parties were enemies. King threatened that deceased would not live two months. Said he had acted the damned rascal with him, and besides the evidence shows a waylaying.

In *Warren v. State*, 9 Texas Court of Appeals, 619, there was former difficulty, former grudges, jealousy as to deceased and appellant's wife, and that deceased was ambushed. Conviction for second degree.

In the case of *Mendiola v. The State*, 18 Texas Court of Appeals, 492, the evidence shows that a few days before the homicide defendant left the deceased apparently *very angry* about a pistol that had been pawned to deceased; also, that Mendiola waited in the office of deceased to kill him, and shot three times, and appeared very deliberate. This is strong evidence of express malice, and sustains a capital conviction.

In the case of *Burkhárd v. The State*, 18 Texas Court of Appeals, 599, the deceased, who was defendant's wife, had filed suit for divorce against defendant on the ground of cruel treatment. Defendant had threatened the life of deceased, was jealous of deceased, had been drinking, etc.; also fired several shots, thus

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showing malice express. The court says the evidence in this case fairly raises the issue of murder in the second degree.

In *Smith v. The State*, 19 Texas Court of Appeals, 95, and 22 Id., 316, defendant and deceased were gambling together. Deceased broke defendant and refused to loan him any more chips, and closed the game, whereupon defendant, who had been drinking, became enraged, threw some chips in the face of deceased, and then shot deceased twice. Conviction in second degree.

In the prominent case of *Leache v. The State*, 22 Texas Court of Appeals, 279, the evidence shows that Dr. Leache was drinking heavily, that he had a previous difficulty with deceased, and that deceased was forcibly taking him home against his will; that appellant becoming enraged, shot deceased and tried to shoot him again, and then said: "I have shot the d—d son of a bitch, and I wish I had killed him," and then tried to escape. Conviction in second degree.

These cases are reviewed to call attention to the difference between them and the case at bar. Each one of the above cases explains itself. The motive and malice is easily discovered. The manner of each of these homicides is consistent with sanity and guilt. But in this case we insist that the record presents a case inconsistent with sanity. It is a strange homicide. There is no motive, no malice, and the record fails to satisfy the mind. The mind is ready to ask for light outside of the record, and to inquire the cause of this tragedy. The only evidence that can be construed to be evidence of express malice is that deceased called attention of appellant to the fact that he was leaving skips in planting cotton seed, and appellant, with no response, thirty minutes later, quietly laid down his sack and went to the house, a few hundred yards distant, and returned with a pistol openly in his hand, muttering and rolling out the damns, and when deceased ran appellant ran after him one hundred yards, and when deceased stopped appellant shot him one time. Instead of this showing a sedate, deliberate mind, and formed desire to kill, it shows an insane impulse. It is inconsistent with sanity. Appellant making no response, waiting thirty minutes; and without a word laying down his sack and going, bringing the pistol in his hand, muttering, chasing deceased and shooting only once, are all evidences of insanity, and not evidence of express malice. Then the subsequent conduct of appellant and the other evidence of

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insanity explains the tragedy and upon no other theory can the mind be satisfied or can the case be explained from the record.

In the case of *Holmes v. The State*, 20 Texas Court of Appeals, 110, is presented one of the most horrible tragedies on record. Holmes went in the night time into the house where deceased lived, and began to cut her and others to pieces with a knife, and when she ran to another room he ran after her and followed her into the yard, cutting until he killed her and another. There was the evidence of an old grudge, extreme bitterness and enmity of long standing, former quarrels, continued abuse, slanderous talk, which ordinarily are the strongest evidences of express malice, but the defendant's insanity was overwhelmingly established, and the court held in effect that instead of this being evidence of express malice it was evidence of a wild delusion, an insane impulse. Yet the jury convicted, and the court below sustained the same. We do not insist that the evidence of insanity is as strong in this case as in Holmes's case, but we do insist that the evidence of express malice is much stronger in Holmes's case than in this. Many of the features of Holmes's conduct are very similar to the conduct of appellant in this case. The rule, as laid down by our court, is that the defendant's insanity must be established by a preponderance of evidence to the satisfaction of the jury. Thus the rule varies as the bias, prejudice or intelligence of the jury varies, and depends upon the particular jury trying the particular case; hence each case must depend upon its own peculiar circumstances. The evidence in Holmes's case was not sufficiently clear to convince the minds and consciences of the jury of Holmes's insanity, yet the evidence was conclusive to the mind of the higher court, and it was held that defendant's insanity was established beyond question; and in this case the court can well say that the evidence falls short of express malice. Such a decision will not be against any precedent or change any rule, but will be in perfect harmony with the line of decisions in this State.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. On the twenty-sixth day of April, 1887, the defendant shot and wounded John Mitchell, and said Mitchell died from the effects of said wound about one month after it was inflicted. On July 23, 1887, the defendant was tried for said homicide and was convicted of murder in the first degree, and

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the death penalty was assessed against him. Defendant moved the court to grant him a new trial, which motion having been refused, he has prosecuted an appeal to this court.

On the trial of the case, counsel for the defendant (said counsel having been appointed by the court, the defendant having employed none to represent him) interposed in his behalf the defense of insanity, insanity existing at the time of the commission of the homicide. Upon this issue evidence was adduced both by the State and in behalf of the defendant, and the court in its charge to the jury explained the law relating to such issue fairly, fully and correctly. No exceptions were taken to the charge at the time of the trial, but in this court counsel for the defendant, while conceding that in the main the charge is a good one, makes two objections to it: First, because, after the court in one paragraph of the charge had instructed the jury that every man is supposed to be sane and responsible for his acts until the contrary is shown to the satisfaction of the jury, it again instructed them in a subsequent paragraph that the burden of proof was upon the defendant to establish insanity. Second, because the court omitted to instruct the jury that, if they should acquit the defendant on the ground of insanity, they should so state in their verdict.

With respect to the first objection to the charge, we do not think it is a valid one. In this particular, as in every other, the charge expounds the law correctly, and, when considered in connection with other portions of the charge upon the issue of insanity, it can not be reasonably concluded that the legal presumption of sanity, and the burden of proving insanity, correctly explained to the jury, could have influenced the jury prejudicially to the defendant. It is not contended, and could not be successfully, that these paragraphs of the charge do not state the law correctly. (Willson's Texas Crim. Law, sec. 85.) The objection is, that said paragraphs make the presumption of sanity and the burden of proving insanity too prominent. We do not think the objection is well made.

With respect to the second objection we do not regard it as a substantial one. While it is provided that "when the defendant is acquitted on the ground of insanity, the jury shall so state in their verdict" (Code Crim. Proc., art. 722), we think this provision is directory merely, and that, while it would be proper and right for the court to instruct the jury in accordance therewith, still, a failure to do so, when it does not appear that the rights

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of the defendant were probably injured by such omission, should not be regarded as material error.

There is but one serious question presented in this case, and that is, Does the evidence sustain the conviction upon the issue of the defendant's insanity? We have given to the evidence a most careful and thorough consideration, and we are clearly of the opinion that the defense of insanity was sustained, and that the defendant should have been acquitted. We have arrived at this conclusion upon the following facts and reasons:

The homicide can not be reasonably accounted for upon any other hypothesis than the insanity of the defendant. No motive whatever, for the act, is disclosed by the evidence. There had been no previous difficulty between the deceased and the defendant; they were friendly, and had never been otherwise. Defendant lived upon the premises of the deceased, and was employed as a farm laborer by deceased. They were working together in the field, planting cotton, the defendant sowing the cotton seed. Deceased remarked to defendant that he was making too many skips in sowing the seed. Defendant made no reply, but continued his work for half an hour, when he quit his work, went to his house, a few hundred yards distant, armed himself with a pistol, which he carried openly in his hand, returned to the field, and, as he approached where the deceased and another person (the brother of the defendant) were at work, he was muttering and, as the witness expressed it, "rolling out the damns." The witness, and the only eye witness of the tragedy, observing the pistol in defendant's hand, and hearing his mutterings, called the attention of deceased to defendant, and inquired what such conduct meant, and the deceased replied: "Green (meaning the defendant) must be crazy." Defendant continuing to approach deceased in the manner described, the deceased, evidently becoming alarmed, ran and defendant ran after him. When deceased had run about one hundred yards, he stopped, turned around and threw up his hands, when defendant, who was then about six feet distant, fired the pistol, wounding deceased in the head. Defendant then deliberately walked away and out of the field. We have recited the facts, substantially, immediately connected with the homicide, and as detailed by the brother of the defendant, the only person present at the time of the killing except the deceased and the defendant. And we will here remark that this witness, although the brother of the defendant, appears to have stated fully and truthfully the facts of this deplorable

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occurrence. The truth of his narrative has not been questioned in any particular, but is strongly corroborated by the other evidence.

What do these facts indicate and prove? Do they show express malice? Do they show a sedate and deliberate mind? There has been no lying in wait, no antecedent menaces, no former grudges, no concerted schemes to do bodily injury to the deceased; in fact, the evidence discloses none of the usual *indicia* of malice except the apparently deliberate manner in which the homicide was committed.

It can not be reasonably concluded that malice was engendered in the mind of the defendant by the remark made to him by the deceased about the manner in which he was sowing the cotton seed. Certainly no *sane* person would have taken offense at such a remark. If this remark influenced the defendant, after half an hour's brooding over it, to quit his work, walk several hundred yards and back, and, in a strange, wild, unreasoning manner, take the life of his friend and employer, with whom he had lived and labored for months previous, and in whose employment he was then earning a livelihood, it is to our minds cogent evidence that his mind was diseased—his reason dethroned. It indicates insanity—not malice—not a sedate and deliberate mind, but a mind wrecked, shattered, devoid of reason, beclouded by delusions, and the slave of wild, uncontrollable impulses.

If the facts we have recited were the only facts before us, our consciences would force us to conclude that the act was the offspring of an insane mind, and could not have resulted from a sedate and deliberate mind. But the defense of insanity does not rest alone upon the evidence we have stated. For six or seven months prior to the homicide, it was the general remark and rumor in the neighborhood in which the defendant lived, among those who associated with him and observed him closely, that his mental condition had undergone a marked change. He had become taciturn, morose, unsocial, absent minded, listless, apparently deeply absorbed in thought, avoiding company and seeking solitude. In short, it was rumored in the neighborhood that he was "going crazy." And the evidence shows that the deceased was not only aware of this rumor, but he believed the truth of it; for, a short time before the homicide, he stated to a friend that the defendant was "going crazy," and, to establish his assertion, ordered the defendant to bring him a rail. Defendant stood with head down and paid no attention to the order.

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After a while, deceased said to him: "Green, I told you to bring me a rail." Defendant said: "Oh, I forgot," and went and brought the rail.

It is evident also from the conduct and language of the deceased at the time of the homicide that he believed that the defendant was insane. It was generally understood in the neighborhood, and had been so understood for six or seven months prior to the homicide, that the defendant was mentally changed, and several instances of strange and unusual conduct on his part, occurring prior to the homicide, and indicating mental derangement, are related by witnesses. His conduct immediately after the homicide, at the time of his arrest, and during his trial, likewise strongly support the defense of insanity. He made no effort to escape after he had committed the deed. He evinced no concern whatever about what he had done. He remained openly in the vicinity of the tragedy from ten o'clock in the morning until night, and then went to his house, within a short distance of where his victim was, and went to bed. No one arrested or attempted to arrest him during the day, although it was known to several what he had done, and that he was in the immediate vicinity. We can only account for this strange unconcern on the part of the defendant, and of the community, upon the theory of defendant's insanity, and the belief on the part of the community that he was insane. If he had been *sane*, having every opportunity to escape, he certainly would have yielded to the instinct of self preservation and sought safety in flight or concealment. Had the people of that community believed him to be sane, it is indeed strange that they did not immediately arrest him and secure his safe keeping to answer for his crime. Sane men, when they perpetrate such unprovoked and atrocious deeds as the defendant had perpetrated, are not usually permitted to wander at will in the vicinity of their crime and in the presence of the society which they have outraged.

While this court is slow to disturb the verdict of a jury upon the ground that it is not warranted by the evidence, it can never give its assent to a verdict which forfeits the life of a human being when the evidence plainly shows, or even preponderates in favor of the theory, that the act committed was conceived and executed by an insane, irresponsible mind. It would be a foul blot upon the records of justice and of the law to visit the extreme punishment of death upon one who has already been visited by a misfortune greater than death, one whose reason

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has been dethroned, whose mind has been wrecked, whose power to choose between right and wrong has been destroyed. In the case before us, we think the insanity of the defendant was clearly established by the evidence, and that the verdict of the jury is contrary to the evidence; and the trial judge erred in not setting aside the verdict upon the motion of defendant's counsel, and because of this error the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered November 9, 1887.

No. 2477.

JOHN BUCHANAN v. THE STATE.

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34	348
24	195
35	297
38	362

1. **BURGLARY—CASES APPROVED—INDICTMENT FOR BURGLARY** by force, threats and fraud, although it fails to charge that the offense was committed by day or by night, will support a conviction if the proof shows that the entry was effected by actual force in the night time applied to the building. Note the approval of Carr's case, 19 Texas Court of Appeals, 635, and Martin's case, 21 Texas Court of Appeals, 1.
2. **SAME—EVIDENCE.**—It is not essential that the State, on a trial for burglary, shall prove the non-consent of the owner, occupant or other authorized person to the entry.
3. **PRACTICE—BILLS OF EXCEPTION** to the exclusion of testimony must disclose the relevancy and materiality of the proposed testimony in order to receive the attention of this court.
4. **SAME—CHARGE OF THE COURT.**—The occupancy of the owner's agent or clerk during the temporary absence of the owner is, in law, the occupation of the owner. The trial court, therefore, did not err in refusing to charge the jury to acquit if the evidence showed that the house, when entered, was in charge of one P., and not of S., the alleged owner.

APPEAL from the District Court of Kaufman. Tried below before the Hon. Anson Rainey.

The conviction in this case was for the burglary of the store house of Herman Schroeder, and the penalty assessed was a term of two years in the penitentiary.

J. B. Adkins was the first witness for the State. He testified that he knew the defendant at the time he was shot. The wit-

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ness then lived about one hundred yards from Peed's Mill, in Kaufman county, Texas. The store and post office at Peed's Mill was kept by Herman Schroeder. The said Schroeder left Kaufman county about five months after the burglary of his said store, and now lives in Illinois. The said burglary was perpetrated in July, 1884. Witness was with Schroeder when he arranged a pistol behind the cash drawer; that pistol was a thirty-eight calibre Smith & Wesson's five shooter. On the Tuesday preceding the Friday on which Schroeder arranged the pistol behind the cash drawer, the witness and the said Schroeder went on a fishing excursion down the Trinity river. Defendant was wounded on the night of the Tuesday that witness and Schroeder started on their excursion. The pistol was arranged to be discharged by an effort to open the cash drawer, and was so arranged by Schroeder to protect the cash drawer. Witness knew that the pistol was loaded with conical ball cartridges, and was left, as arranged, by Schroeder, on the said Tuesday. When witness and Schroeder returned on the following Thursday, they found that the pistol had been discharged, but witness could not say when it was discharged. The store was locked up when the witness and Schroeder started on their fishing excursion. Schroeder and witness were together from the time they started on their excursion until they got back. The store house belonged to Doctor Crawley, but was rented and occupied by Schroeder, who kept a store and the post office in it. George Peed was left in charge of the store house during the absence of Schroeder and witness, and the said Peed received and delivered the mail during that time. Defendant then lived with his father in the Peed's mill neighborhood.

George Peed testified, for the State, that, on the morning in July or August, 1884, after the defendant got shot, he, witness, went into Schroeder's store to attend to the United States mail matters. He found that the southwest door of the store building had been broken open. An overturned coal oil lamp, broken into fragments, lay in the middle of the floor, and the floor around it was saturated with oil. A paper hat box also lay in the middle of the floor. It was the box which was used in arranging the pistol above the cash drawer. A bullet hole passed through the said box, but witness could not discover that the bullet struck the wall any where. Witness did not see the defendant about Schroeder's store at any time during Tuesday, nor did he hear the report of a pistol when it was discharged on

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Tuesday night. Witness was left by Schroeder in charge of the store and post office, during his absence on a fishing excursion. Witness did not miss any money from the cash drawer, nor did he miss any goods from the store. Schroeder warned the witness about the arrangement of the pistol over the cash drawer. The road forked about two hundred yards south of Schroeder's store. The fork passing immediately by the store was known as the Porter Bluff and Kaufman road, and the other, which bore off northwesterly, was known as the Scurry road. Squire Buchanan, the defendant's father, lived about three-quarters of a mile south of the store and below the forks of the road. On the morning after the store was broken into, Sheriff Wilson came to the store and in company with witness examined it.

Alex. Wilson testified, for the State, that he went to Schroeder's store to investigate the burglary on the morning after it was said to have occurred. Squire Buchanan was then absent from home. Witness, however, went to Mr. Buchanan's house where he found the defendant suffering from a serious gun shot wound in the bowels. Witness then went to Schroeder's store with George Peed, and found a Smith & Wesson five shooter arranged as a spring gun over the cash drawer. One chamber had been recently discharged, and four were still loaded with cartridges. A ball had passed through a paper box, but witness could not find any other thing or place in the store that it struck.

Doctor H. J. Snow testified, for the State, that he was called to see the defendant on the night that he was shot. He found the defendant suffering from a pistol or gun shot wound in the stomach. The ball entered the body just below the navel, and passed straight through, lodging under the skin at the back near the spinal column. When witness left Mr. Buchanan's he went to Mr. Patton's house, thence with Doctor W. H. Snow to the store to meet Plummer Buchanan, his object being to ascertain how defendant got shot. When they got to the store they met Plummer Buchanan, who either had an old pair of saddle bags, or directed their attention to a pair somewhere in the immediate vicinity. Witness merely remembered the incident. Witness and Doctor W. H. Snow went by Patton's to find out if Patton had shot defendant. On the morning after defendant was shot the witness heard of Schroeder's store having been broken open. When witness left defendant on the morning after he was shot, witness thought defendant would die, and defendant appeared to entertain the same opinion.

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Mrs. J. B. Adkins testified, for the State, that, at about nine or ten o'clock on the night that Schroeder's store was broken into, she heard the report of a pistol fired in the direction of Schroeder's store. At the same time she heard what she took to be the falling of a table and the groaning and talking of a man. Shortly afterwards a horse left the vicinity of the store and went off towards Squire Buchanan's house. On the next morning the witness heard of the breaking open of Schroeder's store. Witness had been told about the arrangement of the pistol above the cash drawer in the store. Mr. Broughton and his family lived about two hundred yards from the store, and Mr. Frank Sharp about one hundred yards further. A negro family lived about one hundred and fifty yards from the store. Doctor Crawley lived about one hundred yards from the store. People went to the store every day for their mail. Mr. Schroeder and witness's husband were absent on a fishing excursion at the time the store was broken open.

Alf. Patton testified, for the State, that he remembered the occasion on which Schroeder's store was broken open. Witness did not see the defendant on that day or night. He was then on good terms with the defendant, and never had a quarrel with defendant and did not shoot the defendant. Witness had employed counsel to prosecute in this case.

Mrs. Arnold and Mrs. English testified, for the State, that they were sitting up at the house of the latter, about a half mile from Schroeder's store, on the night of the alleged burglary. At about ten o'clock on that night they heard the report of a pistol fired at or near the store. On the next morning they heard that the defendant was shot during the night, and that Schroeder's store had been broken into.

Robert Hutcherson testified, for the State, that he measured his body with the height of Schroeder's counter at the cash box, and found that the counter struck him about the navel. He thought the defendant was a little taller than himself.

Doctor W. H. Snow, for the State, corroborated the testimony of Doctor H. J. Snow, and in addition stated that he cut the ball from under the skin on the defendant's back. It was a thirty-eight caliber conical cartridge ball.

Frank Sharp testified, for the State, that, early on the morning after the burglary, he, having heard of the burglary of the store and the wounding of the defendant, went to the store to examine the premises. Outside of, and near the door which was broken

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open, the witness saw the tracks of a man and a horse. The horse tracks came to the store from the south, and leaving the store went south.

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Rufe Day testified, for the defense, that he and Plummer Buchanan, defendant's brother, went to the Schroeder store on the morning after the burglary. They went specially to look for horse and man tracks. They made a close examination of the ground all about the premises, but discovered no such tracks.

The motion for new trial raised the questions discussed in the opinion.

Marion & Huffmaster and J. S. Woods, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. I. It is charged in the indictment that the burglary was committed by means of force, threats and fraud, and that the defendant did "break and enter" the house. The time, whether day time or night time, is not alleged. It has been held by this court that such an indictment will support a conviction for either a day time or night time burglary, if the proof shows that the force used in the perpetration of the burglary was applied to the building. (*Martin v. The State*, 21 Texas Ct. App., 1; *Carr v. The State*, 19 Texas Ct. App., 635.) In this case the evidence sufficiently establishes that the burglary was committed in the night time, and by means of force applied to the building.

II. Defendant's first bill of exception relates to the admission of testimony which, even if the same was inadmissible, was immaterial, and could not have influenced the verdict of the jury in any manner.

III. It was unnecessary to prove that the house was entered without the consent of the owner or occupant thereof, or of any person authorized to give such consent. (*Taylor v. The State*, 23 Texas Ct. App., 639; *Smith v. The State*, 22 Texas Ct. App., 350, and cases therein cited.) It is therefore wholly immaterial that the State was permitted to prove the non-consent to the entry of the person who temporarily had charge of the house.

IV. As to the defendant's third bill of exception, it does not present the question sought to be raised in a manner to enable this court to determine it. Even if the explanation of the de-

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fendant as to when, where and how he was wounded was admissible in his behalf, we are not informed what the statements were, and can not, therefore, say that they were material to the defendant. It may be, for aught we know, that said statements were that he received the wound at the time and place of the burglary, and while engaged in its commission. If such were his statements, he certainly could not be heard to complain that they were not received in evidence. A bill of exception taken to the exclusion of testimony must disclose the relevancy and materiality of the proposed testimony. Inferences will not be indulged to supply the omission of such essentials. (*Luttrell v. The State*, 14 Texas Ct. App., 147; *Sutton v. The State*, 16 Texas Ct. App., 490; *Counts v. The State*, 19 Texas Ct. App., 450.)

V. It is alleged in the indictment that the house burglarized was owned and occupied at the time by one Herman Schroeder. It was proved that said Schroeder occupied the house as a store house, and that the post office was also kept in said house. At the time of the burglary Schroeder was temporarily absent from his home and store house on a fishing excursion, and had left the house in charge of one Peed during said absence. Peed seems to have been in charge of the house merely as a clerk or employe of Shroeder, and his possession or occupancy of it was only temporary and subordinate to that of Schroeder, and was, in legal contemplation, the possession and occupancy of Schroeder. (Code Crim. Proc., article 426; *Clark v. The State*, 23 Texas Ct. App., 612; *Littleton v. The State*, 20 Texas Ct. App., 168; *Frazier v. The State*, 18 Texas Ct. App., 434; *Bailey v. The State*, 18 Texas Ct. App., 426.) It was not error, therefore, to refuse the special charge requested by the defendant to the effect that if the evidence showed that the house entered was in charge of Peed and not of Shroeder at the time it was entered, they would acquit the defendant.

We have found no error in the conviction, and the judgment is affirmed.

Affirmed.

Opinion delivered November 9, 1887.

Opinion of the court.

No. 2669.

HUGH OWEN v. THE STATE.

OBSTRUCTION OF PUBLIC ROAD—EVIDENCE.—The evidence in this case showing that the road obstructed was not located in accordance with the order of the commissioners court establishing it, and that, therefore, it was not a public road; and that, whether a public or private road, it was obstructed by the accused, not willfully, but with the belief, and with good cause to believe, that he had the legal right to obstruct it, does not support this conviction.

APPEAL from the County Court of Navarro. Tried below before the Hon. J. H. Rice, County Judge.

This conviction was for obstructing a public road, and the penalty assessed was a fine of fifteen dollars.

The opinion summarizes the proof.

Simkins & Neblett, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. At the time the road in question was located over the defendant's land he was a minor, and he did not arrive at the age of maturity until less than two years prior to the time that he obstructed the road by fencing across it. The road was not located on the line designated by the order of the commissioners court. The route designated by said order did not pass over defendant's land, but along its boundary line. In locating the road upon the ground, however, in order, we presume, to shorten the distance, it was placed upon defendant's land, which was at that time uninclosed prairie; but this was with the express understanding at the time that when the owners of said land should desire to enclose it, the road should be changed to the route designated in the order of the commissioners court establishing it.

Defendant desiring to enclose his land, consulted attorneys with regard to his right to do so, informing his attorneys of the facts stated above, and said attorneys advised him that he had the right to enclose his land, and he acted upon this advice, which resulted in this prosecution and conviction.

Syllabus.

We are clearly of the opinion that the conviction is wrong for two reasons. First, the evidence shows that the road located over defendant's land was placed there without authority of law, and was not a public road. Second, conceding that it might and should be regarded as a public road, the evidence shows that defendant obstructed it believing, and having good reason to believe, that he had a legal right to do so, and therefore did not *willfully* obstruct it. Because the conviction is, in our opinion, against the evidence and the law, the judgment is reversed and cause remanded.

Reversed and remanded.

Opinion delivered November 9, 1887.

No. 2674

DAVE MCCLEAVLAND v. THE STATE.

1. **ASSAULT TO RAPE.—CHARGE OF THE COURT** upon a trial for assault to rape instructed the jury that "the law provides that any person shall assault a woman with the intent to commit the offense of rape, he shall be punished," etc.; the error complained of being the omission of the word "if" between the words "that" and "any." *Held*, that the omission is immaterial in view of another paragraph of the charge which properly defines the offense.
2. **SAME.**—The court charged the jury that "the use of any unlawful violence *offered* to another with intent to injure," etc., the objection urged being to the use of the word "offered" instead of the statutory words "upon the person," in defining assault and battery. The defenses interposed were alibi, fabricated accusation, and that the acts charged against the accused, if proved, would not show an intent on his part to rape. Whether or not the acts of the defendant constituted an assault and battery was not an issue of the case, and, under such circumstances, it is *held* that the substitution of the word "offered" for the words "upon the person" was not error to the prejudice of the accused.
3. **SAME.**—However erroneous a charge of the court may be, if it redounds to the benefit of the accused he can not be heard to complain.
4. **SAME.—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—FACT CASE.**—See the statement of the case for evidence sufficient to support a conviction for assault with intent to rape, but also for newly discovered evidence *held* to have demanded of the trial court the award of a new trial.

Statement of the case.

APPEAL from the District Court of Smith. Tried below before the Hon. F. J. McCord.

The conviction in this case was for an assault with intent to rape, upon the person of Olie Stephens, and the penalty assessed against the appellant was a term of two years in the penitentiary.

Olie Stephens was the first witness for the State. She testified that she was twelve years old, and lived with her father at his house in Smith county, Texas. Witness's mother was dead. On the second Sunday in July, 1887, the defendant came to witness's father's house, and told witness that his sister Osie wanted to see witness, and had sent him for her. Witness replied that she could not then leave home. Defendant then asked witness to go with him to the orchard and show him some peaches. Witness and her sister Lula went with him to the orchard. When Lula had filled a bucket with peaches, she went with it to the house. After she had gone defendant told witness that he would give her a silk handkerchief if she would lie down for him. Witness declined and turned to go back to the house, when defendant seized and threw her to the ground, got straddle of her and tried to pull her clothes up. Witness's hands being free, she held her clothes down and called to her sister Lula. Lula shortly appeared, and as soon as defendant saw her he sprang up and ran off through the orchard. Witness did not tell her father because she was afraid he would whip her for going into the orchard with defendant. Her father heard of it through her little brother, who overheard her and her sister Lula talking about the assault. What the defendant did, he did without the witness's consent. The assault occurred shortly after the dismissal of Sunday school.

Lula Stephens, for the State, testified substantially as did the prosecutrix, up to the time that she left the defendant and the prosecutrix in the orchard. She stated in addition that when she put her bucket of peaches in the house, she started through the orchard to a neighboring house to get some fire for the purpose of preparing dinner. She had proceeded about fifty yards when she heard Olie calling for her. She ran to the place near the old well in the orchard, where she had left Olie but a few minutes before. When she got in seeing distance, she saw that defendant had Olie down in the weeds, was on top of her, and was trying to pull her clothes up. About that time the defendant

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discovered witness, and jumped up and fled. Olie then went with witness to the neighbor's house and thence back home.

Miles Stephens testified, for the State, that he was the father of Olie and Lula Stephens, the preceding witnesses. He was not at home on the day of the alleged assault. A few days afterwards he heard his infant son, who could scarcely talk, saying something about Dave McCleavland and Olie. He thereupon called up Olie and Lula, and asked them what McCleavland had done. They told him that on the day of his absence from home defendant threw Olie down in the orchard and attempted to have forcible connection with her. Witness asked Olie why she had not informed him sooner. She replied that she was afraid witness would whip her for leaving the house when he had told her not to leave it. Witness then whipped her for leaving the house and for not informing him of the outrage, and then went before John Price, a negro justice of the peace, and made complaint against the defendant. On the Thursday after the complaint was filed, Jim McCleavland, defendant's father, and Butler came to witness's field where witness was at work, and witness and Jim McCleavland had a private conversation about this matter. Witness told said McCleavland what his daughters had told him about the matter, as he has testified here, but did not tell him that he had to whip Olie to make her confess to the outrage perpetrated on her.

The State closed.

George McCleavland, the brother of the defendant, testified, in his behalf, that he and the defendant and Albert Mitchell were together all day on the second Sunday in July, 1887, and he knew that the defendant was not at Miles Stephens's house on that day. Witness, defendant and Albert Mitchell went direct from Sunday school on that day to aunt Aithey Mitchell's house, where Albert ate dinner. The three parties thence went to witness's house, where defendant and witness ate dinner. Defendant and Albert then went to church, and witness stayed at home. According to this witness the first Sunday in July was the twenty-fifth day of that month, and the second Sunday was the eighteenth day of the month, which information he declared he obtained from the columns of a reliable almanac. Albert Mitchell testified, for the defense, substantially as did the witness George McCleavland.

W. T. Mitchell testified, for the defense, that, just before sun down on the day of the alleged assault, he met defendant and

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Albert Mitchell near Zion church, which was three and a half miles from Miles Stephens's house.

Jim McCLeavland, the father of the defendant, testified, in his behalf, that the defendant was sixteen years old. Witness, a few evenings after the complaint in this case was filed, had a conversation with Miles Stephens, the father of Olie, in the course of which conversation Miles Stephens told him that Olie first denied that defendant had thrown her down, but that he whipped her and made her confess.

Calhoun Butler testified, for the defense, substantially as did Jim McCLeavland, and in addition that he and Jim McCLeavland were traveling over the country inquiring after the health of the community when they met Miles Stephens, at the time said Stephens and Jim McCLeavland had the conversation deposed to by himself and McCLeavland. Witness supposed that the meeting of himself and McCLeavland on that day was by chance. He did not know whether he or McCLeavland proposed to go by Stephens's. This case was not discussed by witness and Jim McCLeavland on that day before they reached Stephens's house, nor did they speak of it after they left. The defendant then introduced the complaint made by Miles Stephens before the justice of the peace, and the case was closed.

In support of his motion for new trial, based upon newly discovered evidence, the defendant filed the affidavit of Miles Stephens to the effect that in his testimony on this trial he was mistaken in locating the time of the offense on the second Sunday in July, 1887; that the assault occurred on the Sunday in July when he attended services at Zion church, conducted by the Rev. Mr. Wesley, which, upon reflection and information, he now knew to have been on the first Sunday in that month. The defendant also filed the affidavit of the Rev. Mr. Wesley to the effect that he preached in Zion church on the first Sunday in July, 1887, and on no other Sunday in that month, and that he saw Miles Stephens at the Zion church during the service on that said first Sunday. The affidavits of several other witnesses were such as, if they testified on a new trial as they stated in their affidavits, and such testimony was found to be true, it would establish the defendant's whereabouts, on the entire first Sunday in July, elsewhere than at Miles Stephens's house or in his orchard, where the offense was alleged to have been committed.

White & Edwards, for the appellant.

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W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This is a conviction for assault to rape. The following errors are assigned: (1.) That there was error in that portion of the court's charge to the jury which instructs them that "the law provides that any person shall assault a woman with intent to commit the offense of rape, he shall be punished," etc. The word "if" is omitted from between the words "that" and "any." There is a full and correct description of the offense in another part of the charge, and the paragraph complained of is simply to inform the jury as to the punishment. The omission of the word "if" could not have injured appellant.

(2.) "The court erred in that portion of the charge which reads: 'The use of any unlawful violence offered to another with intent to injure her,' etc. "Offered" is used, instead of "upon the person," to define an assault and battery. There was no issue upon the trial as to whether the acts of defendant constituted an assault and battery upon the person of the prosecutrix. The defense was alibi, fabricated accusation, and that the acts charged, conceding them to have been committed, were not such as to warrant the inference of an intention to rape. There was no error in this charge that resulted in injury to appellant, under the circumstances.

(3.) Error in this: "The intent at the time on the part of the defendant must have been to overcome all resistance," etc. The objection is that this charge does not specifically point out the *time* referred to in the charge. Now, evidently no juror could have misunderstood what *time* was alluded to in this part of the charge, when considered in connection with the whole charge. Clearly the jury must have understood it to be the time when the assault to commit the rape was made, that they must believe it was the intention of the defendant to overcome all resistance which might be offered by the prosecutrix.

(4.) "If defendant assaulted the prosecutrix with a view to fondle with her, and by persuasion induce her to comply and consent to intercourse, it would not be a rape." The objection urged to this charge is that there is no evidence to support it. If this be so, the charge was favorable, and not at all calculated to injure the defendant. There was no objection to the charge, and no instructions were asked upon this subject.

(5.) "The court erred in overruling defendant's motion for

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new trial, because the conviction was unsupported by the evidence, and because of newly discovered evidence." The law of the case was fully, clearly and very favorably submitted to the jury; and, while we might not, if jurors, have arrived at the conclusion reached by them, still we doubt the propriety of reversing the judgment upon the ground that the evidence does not support the verdict. Upon the ground of "newly discovered evidence," however, we are of opinion that, under the peculiar circumstances of this case, a new trial should have been granted. The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered November 9, 1887.

24 207
31 608

No. 2480.

A. A. STEAGALD v. THE STATE.

MURDER—EVIDENCE—THE CORPUS DELICTI being the issue under immediate inquiry, the State was permitted to ask its medical witness how, in his opinion, based upon the examination of the body, the injuries thereon were inflicted. The defense objected that the question called for the mere conclusion of the witness as an individual, and not for his opinion as an expert, and that it involved matter upon which the jury were as competent to form an opinion as the witness. The objection was overruled, and the witness was permitted to state his opinion as an individual as to "the only way he could imagine the peculiar injuries were inflicted." *Held*, that the objection should have been sustained, but that, in view of the other evidence in the case, the question and answer prejudiced no right of the accused; wherefore the error was immaterial. See the opinion for an elaboration of the ruling.

APPEAL from the District Court of Cooke. Tried below before the Hon. F. E. Piner.

The indictment in this case, which charged the appellant with the murder of the infant of his daughter, Mollie Steagald, in Clay county, Texas, on the twentieth day of January, 1886, was filed in the district court of Clay county on the sixteenth day of March, 1886, and within a few days thereafter the appellant was placed upon his trial in the district court of the said Clay county.

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That trial resulted in the conviction of the appellant in the first degree, the jury assessing the death penalty against him. From that conviction the appellant appealed to this court, which, at its Tyler term, 1886, reversed the judgment because of error committed by the trial court in overruling the motion for new trial, which, among other reasons, was applied for because of the failure of the trial judge under the peculiar circumstances surrounding the case, to order a change of the venue upon his own motion. Upon the reversal of the case, the judge of the district court of Clay county, upon his own motion, ordered the change of venue to Cooke county, in the district court of which, at its spring term, 1887, this trial was had, resulting in the appellant's conviction for murder in the first degree, with a life term in the penitentiary assessed as his punishment.

The report of the proceedings of the first trial of the appellant, comprehending a full statement of the evidence then adduced, will be found in the twenty-second volume of the Reports, commencing on page 464. The evidence presented upon this trial was substantially the same as that adduced upon the former trial, except that, upon this trial, the counsel for the State elicited from one of the medical witnesses a more positively expressed opinion that the wounds found upon the body of the deceased were inflicted before death, proved more directly the predicate upon which the written testimony of the witnesses residing out of the State was admitted, and produced the additional witnesses who testified to the facts set forth in the opinion of the court and in the summary which follows.

Doctor S. G. Bittick, the first witness for the State, testified substantially as he did upon the first trial of the defendant. Referring to his testimony, as it will be found set out in the report of that case (22 Texas Ct. App., 464), it will be seen that he stated that when he first arrived at the house of the defendant, during the labor of his daughter Mollie, and before the birth of the child, he found no one present but defendant and his wife and an old lady whose name he did not know. Reiterating that statement upon this trial, the witness said that he had ascertained the name of the old lady since the former trial, and that it was Mrs. Candler. According to the statement of the witness on this trial, Mrs. Candler was present at the defendant's house when witness arrived, but left the house on the evening of Friday, the day before the child was born, and had not been seen by the witness since. This witness denied that he told defendant

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that anything was the matter with Mollie's liver, or that he operated on her liver.

The State introduced Mrs. Candler, who testified, in substance, that she lived in Cambridge, Clay county, Texas, and lived there in January, 1886. She was then but slightly acquainted with the defendant, having seen him but a few times. On the night of January 14, 1886, the defendant came to the witness's house and requested her to go with him to his house to see his wife, who, he said, was very sick. Witness readily consented to go home with defendant and render any service in her power to Mrs. Steagald. En route, and before reaching the house, the defendant said to witness, "You will be more surprised when you go into my house than you ever were in your life." The witness asked him what would so surprise her, and defendant replied, "We are in a heap of trouble." He had previously said to the witness that he had more trouble than any man living; to which the witness replied that "people sometimes borrow their trouble." When the witness entered the defendant's house she found Mrs. Steagald, whom he had reported very sick, up and attending to her household affairs, in apparently perfect health. She, however, found Mollie, the defendant's eldest daughter, sick in bed. The defendant did not tell witness what was the matter with Mollie, but witness soon found out her condition, and told defendant that he had better summon some of the other of his lady neighbors. Defendant replied that he wanted no one else at his house, that the other women talked too much. The witness then told him that he must summon a doctor. Defendant then went off and came back with Doctor Bittick. Doctor Bittick came first to the door, without going in. He then went off and returned after a while with Doctor Galloway. This was on January 15, 1886. Just before Doctor Bittick got back with Doctor Galloway, the witness observed the defendant and his wife alone together in their kitchen, and overheard the defendant tell his wife that when the doctors came she must tell them that Mollie was a girl who had been living with them some time. Mrs. Steagald replied to the defendant: "I won't do it; if you want that told, tell it yourself." Witness remained at the defendant's house until about four o'clock on that evening, when she went home, was taken sick, and did not go back to the defendant's house at all. Shortly after the witness reached the defendant's house, the defendant asked her if she could do anything for Mollie, and said that if she could and would, he

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would pay her well. Shortly after that the defendant came from the kitchen into the front room, where the witness then was, and while walking across the floor he said in a loud voice, but speaking to no one in particular: "The scoundrel is gone or I would kill him!" The witness saw no infant's clothing while she was at the defendant's house. Mollie Steagald had never been intimate with, nor had she ever kept the company of any young man. Mrs. Steagald and her family were not living in Cambridge at the time of this trial.

Mrs. McKinsey testified, for the State, that she lived in Cambridge, Clay county, Texas, in January, 1886. She had then known the defendant and all of his family about five years. The defendant's daughter Mollie died in the defendant's house in Cambridge, on or about January 20, 1886. The witness went to the defendant's house on the morning of the Tuesday on which Mollie died, and remained there until Mollie's death in the evening. When she found Mollie sick, she asked the defendant what was the matter with her. He replied that she was suffering from an abcess on the liver, which the doctor had tried to remove. About noon of the same day he corrected that statement, and said that Mollie's affliction was abcess of the womb. The defendant remained near and about Mollie's bed during the whole time witness was at the house. A short time before the girl's death, the witness and other ladies decided to bathe her. The defendant interfered, and insisted on bathing her himself. Witness pushed him back, and told him that so long as she was there attending upon the sick girl, he could not bathe her. Defendant insisted that he was so accustomed to bathing his daughter that he could do it better than any one else. He yielded reluctantly, and the ladies proceeded to bathe the girl, and in doing so the witness discovered the bandages around the girl's abdomen, and for the first time ascertained the true nature of the girl's illness. Just after the death of Mollie, the defendant came into the front room and asked his wife, in witness's presence, what clothes he should get for the dead girl to be buried in. Mrs. Steagald replied: "She needs everything, for she has nothing." In reply, the defendant said to his wife: "Don't fret, Kate; Mollie is better off, for she is in Heaven; we will try to raise our other children better, and we will do better ourselves." Mrs. Steagald replied: "I think it is time; I wish you had thought of that sooner." Defendant then said: "I will never say again that there is no Heaven and no God." He then

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left the room, saying to his wife: "Say nothing about this, Kate; just keep it quiet." During all of the time that witness was at defendant's house, she saw nothing of any infant's clothes, nor did she, up to the time of Mollie's death see anything of the child. After the inquest over Mollie's body, some of the men found the body of an infant in the garret of defendant's house. An inquest was then held upon the body of the infant, and it was then given to witness to dress. The body had never been dressed, nor had it been washed except on the face and one side of the head. The right arm was broken between the elbow and the shoulder, and was bloodshot from the wrist to the shoulder, imparting a very dark and almost purple color to the arm. The neck was also broken, and the back part of the skull was crushed in. Witness washed and dressed the child, and gave it to the men, who took it to Henrietta, whence it was afterwards brought back and buried in its mother's arms. Just before Mollie's death, the witness asked her if she thought she could eat anything. She replied that she felt like she would relish a little rice. Witness then proposed to send to a neighbor's house for some rice. This, however, the defendant would not permit her to do, saying that he had sent to town for some. Mollie Steagald had never, during the witnesses's acquaintance with her, received the attention of any young man. She was never in the company of a young man but once that the witness ever heard of, and that was when, about a year before her death, the witness's son escorted her home from church. Mollie generally attended church and parties, but usually in the company of the defendant, and invariably in company with some member of her family.

R. V. Bell, Yancy Lewis and E. P. Hill, for the appellant: Appellant's first proposition asserts the inadmissibility of Doctor Ferris's testimony as to his opinion as to how the injuries described by him on the body of the infant were inflicted. Under the decisions of the courts of this State, this evidence, it is submitted, is clearly inadmissible. *Cooper v. The State*, 23 Texas 331, followed and approved in *Campbell v. The State*, 10 Texas Ct. App., 360, is the leading case in point. In that, a capital case, the court considered at length the present question, and both stated the rule governing this character of testimony and collated its exceptions. "Where the jury are as competent as any other persons to deduce the proper conclusions from a given

Argument for the appellant.

state of facts, the opinions even of scientific witnesses are not admissible in evidence, as to the conclusion or inference to be drawn from them." (Cooper's case.)

Touching the exceptions to this rule, Judge Sutherland says: "On questions of science or skill or trade, persons of skill in those particular departments are allowed to give their opinions in evidence; but the rule is confined to cases in which from the very nature of the subject facts disconnected from such opinions can not be so presented to a jury as to enable them to pass upon the question with the requisite knowledge and judgment. Thus a physician may express an opinion that the wound given or poison administered produced the death of the deceased."

There is another class of cases in which the question is not one of science or skill, yet in which non-expert witnesses are permitted to express their opinions. Illustrations of this class occur when witnesses testify to identity; to handwriting; to sanity or insanity; to degree of affection entertained by one person for another. A correct statement of the rule we submit, is: In matters of science or skill, it is proper to prove by expert opinions what amounts, not to a decision of a fact to the exclusion of the jury, but to the establishing of a new fact, relation or connection, which would otherwise remain unproved; and in some matters, not of science or skill, to prove certain facts as of identity, etc., by the opinions of witnesses, resting on a knowledge acquired in a way that can not be communicated, or based on facts that in their very nature are incapable of being explained to others.

Now, in the language of the rule, was Doctor Ferris's opinion acquired by the exercise of peculiar skill, and did it establish some new fact, connection or relation, which otherwise would have remained unproved? He says he did not speak as an expert. Obviously he established no new fact. Did his opinion rest on knowledge acquired in a way that could not be communicated or based on facts incapable in their nature of being explained to others? Clearly not; for he stated the source of his opinion and averred the damning fact that it was derived from examination of the body.

Counsel had endeavored to exclude this testimony in the way known to the law and the practice. They had objected to its admission. To the action of the court overruling their objection they had duly saved exception. Under the circumstances it was not for them to assume that the learned judge would strike out

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on request what he had admitted over exception. And had counsel so known they could not, by moving the court to exclude, have righted the effect of this gross error; they could not have effaced from the minds of the jury the picture of this appellant, in murderous fury, crushing with iron heel the infant's skull, wrenching and breaking its arm and dislocating its neck. The jury had received the fact that this was the conclusion reached from the examination of the body by the man called in professional capacity to perform that duty. No instructions of the court could have effaced it. No elaborate presentations by counsel of the law's requirements of proof could efface it. Vain and idle was it to argue to the jury that the corpus delicti was not proved; that the injuries existing, magnified and exaggerated by the startled spectators, were produced by natural causes connected with the birth, or might have been caused by accident occurring in hiding the body. Idle such arguments, with this spectre of Doctor Ferris's imagination before the jury, even though the court had, on motion to exclude, in terms "bid it down." When did it become the law that a witness, not speaking as an expert, could testify to his opinion in a matter about which the jury were as competent to judge as the witness? In admitting this testimony over objections specifically stated and over exceptions duly saved, counsel for appellant, with whatever cogency they can command, insist and urge that the trial court erred in a matter, not irrelevant or immaterial, but of pregnant import to appellant, and that though this record should in other respects be held free from error, for this alone, fatally prejudicial to his rights, the cause must be reversed and remanded.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. Appellant stands convicted of the murder of an infant, the child of his daughter; the jury finding him guilty of murder of the first degree and assessing his punishment at confinement in the penitentiary for life.

We have carefully examined this record, both with reference to assigned and unassigned errors, and the examination leads us to the conclusion that it presents but one question which requires discussion.

Upon the trial the State propounded this question to Doctor Ferris: "What is your opinion, from the examination you made

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of the body, as to how the injuries you saw, to wit, the arm broken, the neck broken and the skull crushed, was done?" This question was objected to by appellant, because "it called for the opinion of the witness as an individual, and not as an expert; was mere speculation on the part of the witness, and was matter about which the jury were as competent to judge as the witness." The objection being overruled, the witness answered: "I am of opinion that the only way it could have been done, or the only way I can imagine, is that the party put the infant on its face, and placed his boot heel on the back of the head, and caught hold of the right arm and pulled it, and stamped on the back of the head, crushing the skull and breaking the neck and arm." "Witness Ferris also stated that this opinion was not as an expert, but as individual, and the injuries might have been inflicted in many other ways."

The objection should have been sustained upon the grounds urged. Incompetent, however, as it clearly was, did the opinion of the witness, as to the manner in which the injuries were inflicted, operate to the injury of appellant's rights? Do the facts stated in the opinion of the witness tend to establish the corpus delicti. That is to say, that the child met its death, after being born alive, at the hands of some person by violence? They certainly do; but was not this completely and conclusively established by competent evidence, independent of Doctor Ferris's opinion.

Doctor Bittick, who attended at the birth of the child, says: "The child's arm and neck were not broken, and its skull was not crushed, nor were any wounds or bruises on it when it was born, or when I last saw it alive. I stayed half, or perhaps an hour, after the birth of the child, and then left and went home. When I left the child was lying across a small bed at the foot of its mother's bed, still unwashed and undressed, wrapped in a piece of quilt. It was crying occasionally and breathing all right, and I saw nothing whatever the matter with it."

Doctor Barnett says: "I do not think that a new born babe's neck could be broken, head crushed and arm broken, by an accidental fall of any kind. I do not see how it is possible for such a combination of injuries to be produced by accident." To the same effect is the testimony of Doctors Watson, Black and Egan.

For the defense, Doctor Thurmond testified: "If I should see a contusion or discoloration to any great extent on the arm of a

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dead body, I would conclude that the injury which inflicted discoloration was given before death."

Doctor Watson, for defendant, says: "If I should find the dead body of a child, with its neck broken, its skull crushed in to the depth of half an inch, its arm broken, discolored and blood shotten, I should conclude that it had come to its death by violence, and not from natural causes." On the same side and to the same effect also testified Doctor Modrall.

It was proven by several witnesses that after a short search they found the dead child hid in the garret of defendant's house; that there was a hole in the ceiling, which was covered with a sack nailed over closely. The body was found in a box, the neck and arm broken and the skull crushed.

Now, we believe that if it be possible to establish any fact conclusively, the fact of the corpus delicti, that is, that the child was born alive and came to its death by violence, this fact is so established in this case. And, conceding that the opinion of Doctor Ferris tended to prove the corpus delicti, since there could not be a rational doubt as to this, the opinion could not have injured appellant's rights.

Did the opinion of Doctor Ferris in any way point out the defendant as being the person who inflicted the injuries? We think not; nor is this effect claimed by counsel who so ably represent the appellant here. But it may be contended that appellant was prejudiced, because the method of the infliction, as exhibited in Doctor Ferris's opinion, presents a degree of inhuman barbarity almost without a parallel in the history of crime. The imagination is not fertile enough to invent a method by which the injuries which were in fact inflicted could be abated of their cruel brutality. Concede that the wounds were inflicted in any other way than as surmised by Doctor Ferris, none could be conjectured which would relieve the killing of its hideous enormity. That the appellant was thus prejudiced is contradicted by the punishment assessed. If he was the perpetrator of this foul deed, there can be no doubt that the crime is murder in the first degree; there is no lower grade in the case. The jury had the right to decree his death, but chose the more merciful punishment. The judgment is affirmed.

Affirmed.

Opinion delivered November 9, 1887.

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No. 2649.

BUNK ALLEN v. THE STATE.

1. **MURDER—EVIDENCE—SELF DEFENSE.**—It is a well settled principle of law that if one willingly enters into a deadly conflict, or provokes the contest, or produces the occasion, in order to have a pretext for killing his adversary or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the conflict. Note the opinion for a state of proof in a murder case to which the rule applies, eliminating the issue of self defense.
2. **SAME—INTENT—CHARGE OF THE COURT.**—Intent is a condition of the mind which may be evidenced by outward acts or words spoken. The evidence in this case shows that after the apparent abandonment of the dispute, and after the deceased had put away his pistol, and started to leave, but before he actually left the ground, the accused, displaying his pistol, said: "We had as well settle this thing now," and almost immediately fired upon deceased. The defense claims that, in charging upon the legal consequences of the renewal of the difficulty by the accused, the court erred in failing to instruct the jury that they might inquire into the intent of the accused in renewing it. *Held*, that the proof in question manifested the intent, and was undisputed; wherefore there was no issue requiring such an instruction.
3. **SAME.**—Note the opinion for a state of proof under which, in charging the jury upon the right of the accused to act upon the appearance of danger, the trial court did not err in instructing only upon the appearance of *real* danger.

APPEAL from the District Court of Wise. Tried below before the Hon. George A. McCall.

The conviction in this case was in the second degree for the murder of Tom Gill, in Wise county, Texas, on the fifth day of April, 1886. The penalty assessed against the appellant was a term of thirty years in the penitentiary.

J. W. Hutchinson was the first witness for the State. He testified, in substance, that he had an appointment to go with the deceased to the country, after a cow, on the fifth day of April, 1886, and, for the purpose stated, met the deceased at about nine o'clock that morning, on the public square in Decatur, Wise county. To the witness's proposition to go at once after the cow the deceased replied that he was not then ready; that he had been informed that Bunk Allen, the defendant, had been threat-

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ening around town to "put out his light" before night, and that he wanted to see about it. Twenty minutes later the witness again met the deceased on the southeast corner of the square, and again proposed to go after the cow, but deceased insisted that he would wait a while longer to see the defendant about the threats. The witness, leading his horse, and the deceased were then standing a few feet north from the walk in front of Dwyer's store, which occupied the east corner of the south side of the square. The Bank saloon was across the street, immediately east of Dwyer's store. The street intervening between the saloon and Dwyer's store ran north and south across the square, and was about fifty feet wide. While witness and deceased were standing at the point indicated, the defendant and Dick Derrett came along, traveling the sidewalk, and going east toward the saloon. When they got about opposite witness and deceased, the latter, drawing his pistol and raising it until the muzzle pointed backward over his shoulder, stepped to defendant and said to him: "Bunk, I understand that you have said that you will put my light out before sun down." The defendant denied that he made the threats and the deceased asked him: "D—n you, didn't you say it?" Defendant replied: "No; I have been wanting to see you and have a talk with you." After a few more words passed, the deceased said: "That settles it," and lowered his pistol, and started west towards Dwyer's store. Witness did not observe what deceased did with his pistol, but, thinking the difficulty was over, he turned to his horse. About that time witness heard defendant say: "Tom, we will settle this thing now," or "Tom, hadn't we better settle this thing now?" Looking back at once, the witness saw the defendant with his pistol held in both hands and pointed west towards Dwyer's store. The shooting commenced at once, five or six shots being fired. Witness did not know which party fired first. After the shooting, witness saw the dead body of the deceased lying in Dwyer's store. One ball entered the right breast and passed out at the top of the left shoulder. Deceased did not curse the defendant otherwise than as stated by the witness, nor did he call the defendant a "son of a bitch."

George King, the next witness for the State, testified that he and Clabe Cates were on the street between the Bank saloon and Dwyer's store at the time of the shooting. Witness saw the deceased and Hutchinson near Dwyer's store, and a few moments later he observed the approach of the defendant and

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Derrett. He then saw the deceased draw his pistol and throw it over his shoulder until the barrel pointed behind him and step up to defendant. He said to defendant: "I have heard that you are going to put my light out before sun down." Defendant denied having made the threat, and, upon deceased asking him if he made the threat, he replied: "No; I have been wanting to see you for some time. I have nothing against you, and never did have." Deceased then said: "That is all right; that settles it," lowered his pistol and walked off towards Dwyer's corner. Witness then turned to defendant and said to him: "You are in enough trouble; if I were you, I would let this thing alone." Defendant made no reply to witness, but walked north a few steps, drew his pistol, called to deceased and said: "We will settle this thing now," firing towards deceased at that instant. Deceased was in the act of stepping upon the porch in front of Dwyer's store. He passed into Dwyer's store, and witness saw him no more until after the fight was over. He was then dead. Defendant fired the first two shots in very rapid succession, and the deceased's first shot followed an instant later. The shots were all fired in very rapid succession. Defendant held his pistol in both hands and fired four shots. The deceased fired two shots. Deceased did not curse the defendant nor call him a son of a bitch.

Clabe Cates testified, for the State, substantially as did the witness King up to the point where the deceased lowered his pistol with the remark "that settles it," and started off with witness. From that point the witness testified substantially as follows: When the deceased started off with witness he lowered his pistol and put it down in his pants on the left side and pulled his vest down over it. He and witness then walked towards Dwyer's store, witness being on the right side of deceased. Just as they stepped to the porch in front of Dwyer's store, witness heard deceased's name called, with a remark he did not understand. Immediately after the call a pistol fired, and deceased sprang into the door of Dwyer's store, drawing his pistol as he went in. Witness sprang from the sidewalk to the right. Deceased soon appeared at the door of Dwyer's store with his cocked pistol in his hand and he and defendant fired at each other. Deceased stepped back and cocked his pistol, which appeared to be out of repair. He then returned to the door and fired again, his pistol appearing to go off before he was ready. He then stepped back into the store and began to manipulate

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his pistol, which would not revolve, and at this juncture the defendant fired and shot him through a glass door. Deceased did not curse the defendant nor call him a son of a bitch.

Mont Cates, who heard nothing and only saw the shooting from a distance, testified substantially as did Clabe Cates as to the movements of the parties at the time of the shooting, and said that defendant and deceased fired at very nearly the same time.

R. B. Stanton testified, for the State, that he was in Dwyer's store when the fatal difficulty occurred. He was behind the counter and about half way down the store room, when he heard the report of a pistol, fired, he thought, about the Bank saloon. Witness then made a quick step to the front of the store, and saw deceased jump to the porch going west. He entered the east door with his pistol in both hands and appeared to have just drawn it from his pants, his vest being turned up. He then stepped to the door and fired; some person firing from the east about the same time. He then stepped back, cocked his pistol, returned to the door and fired again, his pistol evidently going off before he was ready. He then stepped back and was manipulating his pistol, when two shots were fired through the glass door. The last shot struck and killed him.

M. Dwyer testified, for the State, that, looking east from the back door of his store, he saw defendant, deceased and George King standing near the back end of the Bank saloon. Deceased had his pistol in his hand, resting on his hip, but soon raised it above his shoulder, so to point behind him. He and defendant appeared to be talking, but witness could hear nothing they said. Presently deceased put his pistol down in his pants, covered it with his vest, and turned and walked toward the front door of witness's store. Defendant walked north to the front door of the saloon, when he drew his pistol, presented it with both hands and fired. Witness could not then see deceased. Defendant continued to look west as if watching for some one. He presently raised his pistol and fired again, and about the same time a pistol was fired at witness's front door. Several more shots were fired. When it was all over, witness went to the front of his store, where he found the dead body of deceased.

W. L. York testified, for the State, that, from where he was on the west side of the square, he heard the shooting at the south east corner of the square. He started to that point and met the defendant, who, waving his pistol several times, exclaimed:

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"By God, I reckon I am the chief!" W. A. Bonner testified, for the State, substantially as did York, and in addition that the defendant called for another "gun," and for "protection."

The State closed.

J. F. Ford was the defendant's first witness. He testified that he was on the square and near the front of the Bank saloon when the fatal difficulty occurred. He heard the defendant call to the deceased and say something about "settle." He then saw defendant, using both hands, fire his pistol towards Dwyer's store. At the time defendant fired, witness saw deceased with his pistol in his hands, the pistol pointing downwards. Witness could not say whether deceased was then looking towards or from defendant. Defendant fired the first two shots, but his second shot and the deceased's first shot were fired at very nearly the same time.

Tip Rush testified, for the defense, that about twenty minutes before the fatal meeting of the defendant and deceased, the deceased came from the Bank saloon to the witness, who was then standing in front of Dwyer's store, took hold of witness and said to him: "Come, go with a gentleman, and don't run with that d—n fellow." Witness went with deceased to the mayor's office and executed a bail bond, witness being charged with carrying a pistol and deceased signing his bond. Witness and deceased separated, and within a few minutes defendant came to witness and said: "That boy ought not to have said that. He has my sympathy, but if he don't want it, it is all right. If he comes at me for a fight, I will fight him, and fight him d—d hard." Defendant was close enough to hear the language used by deceased just before they went to the mayor's office. Deceased was drinking at the time.

Mike Chambliss testified, for the defense, that, during the year 1884, when witness was running a saloon in Decatur, and defendant was keeping bar for him, defendant asked witness to go to deceased and compromise their quarrel. Witness went to deceased and proposed to compromise on behalf of the defendant. Deceased replied that he had no compromise to make, and that if the law did not handle the son of a bitch, he would kill him. Witness reported deceased's statement to defendant, and then discharged defendant because, by keeping him, he was losing the patronage of deceased and his friends. Defendant then went to work for Lewis & Willis at the Bank saloon. The witness testified for the defendant upon the latter's trial for the

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murder of Mack Gill. Defendant testified in behalf of the witness on the trial of the witness for the murder of Fambrough.

M. W. Miner testified, for the defense, that he was deputy sheriff of Wise county in the year 1883. In December, 1882, Mack Gill and the deceased's brothers, got into a fight with the defendant, in the course of which Mack Gill was killed, and the deceased was wounded. One W. S. Gilbert and the defendant were indicted for the murder of Mack Gill. One night, during the year 1883, the witness and W. S. Gilbert went into the Bank saloon to get a drink. As they approached the counter the witness saw deceased among the several parties present, and noticed that Gilbert backed off on seeing deceased. Witness thereupon took deceased to one side and asked him what was the matter between him and the defendant and Gilbert. He replied that the defendant had said that "he got his man," and that Gilbert, in that same connection, said that he "wished he had got the one he shot at." Witness told deceased that he did not believe that defendant and Gilbert made the remarks imputed to them, and that, if deceased would confront defendant and Gilbert, he, witness, would bet his ears that they would deny making the remarks. Deceased replied that if Gilbert did not make the remark, he would make friends with him; that he could "hug" Gilbert, but as for Bunk Allen, he wanted no "truck" with him. Defendant was tried at the last term of the court for the murder of Mack Gill and was acquitted. The prosecution against Gilbert for the same offense was dismissed.

Tom Whitehead testified, for the defense, that he had often known the defendant, in order to avoid meeting deceased, to leave places upon the appearance of deceased; and often, when he knew deceased to be in town, at night, he would sleep with witness. Mr. Willis, one of the proprietors of the Bank saloon, in which defendant was employed as bar tender, testified that he had often seen the defendant leave the saloon when deceased entered.

Mr. Lewis, Mr. Willis's partner, corroborated the statement of the latter, and testified, in addition, that he finally discharged defendant to avoid losing the patronage of the deceased and his friends. The witness also stated that, some time in 1885, in Harvey's office, and in the presence of Harvey, he proposed to buy a certain pistol from deceased. Deceased refused to sell the pistol, saying that he would not part with it, as he wanted to kill Bunk Allen with it. Witness had never heard defendant

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threaten to kill deceased. Witness never, at any time, gave a note to R. J. Bonner, to be delivered to deceased, upon which was written "Look out for danger." After he quit working for witness, the defendant went to Abilene, and his residence was in that town when he killed deceased.

James Spann testified for the defense, that, about eighteen months before the killing of deceased, he heard some one in Sparrow's drug store say to deceased: "Bunk Allen is in town." Deceased replied: "Yes, God d—n him; I don't know what he is here for. He and I can't live in the same town, and if he don't leave he or I will have to die." Witness never told any one of that statement except his father-in-law, whom he told on the day of, and just after the killing of deceased. Sparrow was behind his prescription case at work when deceased made the statement detailed.

Ben Allen, the defendant's brother, testified in his behalf that at the time of the homicide the defendant was living in Abilene, but was in Decatur attending his trial for unlawfully selling liquors. He was tried on Saturday, and was to have returned home on the night train on the day of the killing.

John Strickland testified, for the defense, that he met the defendant at Fort Worth en route to Decatur to stand trial for unlawfully selling liquors, and witness accompanied him to Decatur. The defendant took no pistol with him from Fort Worth to Decatur, but borrowed one about nine o'clock on the morning of the killing.

S. S. Cobb testified, for the defense, that he took a nearly full bottle of whisky from the dead body of the deceased. Frank Lovejoy testified, that a short time before the killing he saw deceased take a drink of whisky from a bottle which was then nearly empty.

J. W. Oates testified, for the defense, that just before the fatal shooting he heard the defendant say to deceased: "If we have to settle this thing, we may as well settle it now." Defendant and deceased drew their pistols about the same time, and fired at each other about the same time.

R. E. Derrett testified, for the defense, that he was with the defendant when the fatal difficulty occurred. Deceased drew a pistol, ran up to the defendant, thrust the pistol in his face, and said: "You God d—d son of a bitch, did you say you were going to put my light out?" Defendant denied that he made such threat, and deceased said: "You are a d—d liar; you did say

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it." Defendant replied: "No, I did not." Deceased then put his pistol down his pants in front, and turned off; but looked back and asked defendant: "Didn't you say it?" Defendant replied that he did not. Deceased then went to the front of Dwyer's store, when defendant called to him: "We had as well settle this thing now." Deceased turned, drawing his pistol. Defendant drew his pistol about the same time. They opened fire on each other about the same time, and the firing continued until deceased was killed.

M. B. Griffith testified, for the defense, that he saw the parties when they separated, deceased going towards Dwyer's store. Just as he reached the gravel walk in front of Dwyer's, deceased turned and said: "I will see you later, Bunk." Defendant replied: "If we have to settle this, we had as well settle it now." Deceased turned, drew his pistol and fired at defendant. Defendant then raised his pistol and fired at deceased, and the firing continued until deceased was killed. Witness plainly saw defendant raise his pistol and fire after deceased fired the first shot. He had not seen defendant's pistol until after deceased fired, and did not know when it was drawn.

The defense closed.

H. T. Harvey testified, for the State, that defendant was in his place of business on the Saturday before the killing. Scott Gordon was present. Defendant, who was drinking, said: "I wonder if that son of a b—h Tom Gill is in town. I want to settle with him before I leave." Defendant then had a pistol on his person. Witness never heard the deceased, in his place of business or elsewhere, in the presence of John Lewis or anybody else, say anything about defendant. Deceased's reputation was that of a quiet, peaceable, inoffensive man.

J. W. Sparrow testified, for the State, that from his work place behind his prescription case, in his drug store, he could hear nearly anything said in his drug store. He never, at any time, heard the deceased make the declaration testified to by the witness Spann. Deceased was a peaceable, quiet, law abiding man.

R. J. Bonner testified, for the State, that about a year before the homicide John Lewis gave him a note to hand to deceased, on which was written: "Look out for danger." Witness gave the note to deceased.

The State closed.

Matt Clarke testified, for the defense, that he looked from the Bank saloon just before the shooting, and saw deceased with his

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pistol pressed against the defendant's stomach, and heard deceased call defendant a son of a b—h, and say that he would blow defendant's light out.

Crane & Patterson, E. C. Smith and H. M. Furman, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. Under an indictment charging him with the murder of Tom Gill, appellant was convicted below of the second degree of that offense.

A number of witnesses for the State testified that appellant fired first in the interchange of shots which led to the homicide; others for the State timed the first firing as so nearly simultaneous that it was impossible to say which of the two took the initiative. Two witnesses for the defense testified that deceased fired first; others were in doubt. But the testimony of all left beyond dispute these facts: There had been a passage of words between appellant and deceased; angry and accompanied with a show of violence on the part of the deceased, and deprecatory—in semblance at least—on the part of appellant. In response to appellant's disclaimer of certain threatening and abusive language, attributed to him by deceased concerning himself, deceased had closed the controversy with the reply: "That settles it, then;" and, returning the pistol he had displayed to his pocket and walking off, his back was turned to appellant. Before he was out of hailing distance, deceased was stopped with the exclamation from appellant: "We had as well settle this thing now," or words of that import, accompanying the words with the display of a pistol held in both hands, which he almost immediately thereafter used with deadly effect. As to this renewal of the difficulty after it had been abandoned by deceased, both by word and act, there is no sort of conflict in the testimony.

It is well settled in principle that, where one willingly enters into a deadly conflict, or "provokes the contest, or produces the occasion, in order to have a pretext for killing his adversary or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the combat." (Cases on Self Defense, H. & T., 227, and note; Reed v. The State, 11 Texas Ct. App., 509; King v. The State, 13 Texas Ct. App., 277; White v. The State, 23 Texas Ct. App., 163; Peters

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v. The State, 23 Texas Ct. App., 687; The State v. Partlow (Mo.), Southwestern Reporter, May 16, 1887.)

The application of this principle to the facts of this case completely eliminates the question of self defense, whence it follows that the errors complained of in the admission and rejection of testimony—if indeed they be errors—become immaterial and harmless.

It is made subject of complaint that, in instructing the jury as to the legal consequences of appellant's renewal of the difficulty—if they should find that appellant did renew it—the court erred in failing to direct the jury that they might inquire into the intent with which it was renewed. To this it is answered that every instruction given by a court to a jury in the trial of a cause should be confined to the issues made by the facts. We are of opinion that the undisputed facts of this case relieved the court of the duty of charging upon the intent. Intent is a condition of the mind, to be spelled out from outward acts or spoken words. In this case the act was the presenting of a pistol within range, held in both hands, presumably to secure greater accuracy of aim. The words accompanying the act conveyed a desire and intention to "settle" the matter then and there, with a deadly weapon as the arbitrator. Spelling out the intent in the light reflected from the word and act, its reading and interpretation can not fairly be treated as an open question.

It is further urged that the court erred in instructing the jury that "it would be immaterial whether the danger was real, provided the defendant acted upon the real appearance of danger." The specific objection raised is that "it limits and abridges the right of the defendant to act upon *real* appearances of danger, and omits *reasonable* appearances of danger." The same general answer applies to this objection as to the one preceeding. Danger with reference to whether the appearance of it is "real" or "reasonable," takes its classification under one or the other, according as whether the manifestations are positive, threatening and imminent, or are merely such as reasonably create alarm and apprehension for one's safety. "Real" danger is a danger such as is manifest to the physical senses; "reasonable" danger, as the very force of the term imports, is something to be judged of by an exercise of reason and judgment, exercised upon acts which require construction to render their meaning apparent. It is manifest from the facts in evidence that whatever danger there was to appellant, if any at all, was *real*; and hence the

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court discharged its duty when it instructed the jury upon that character of danger, it not being bound to instruct upon another form of danger, which the facts not only did not present, but absolutely precluded.

The evidence in the record amply supports the verdict and judgment; and, the rulings and charges of the court being free from reversible error, the judgment is affirmed.

Affirmed.

Opinion delivered November 9, 1887.

No. 2673.

EX PARTE THOMAS ROSSON.

HABEAS CORPUS—SECOND APPLICATION—CASE STATED.—The relator being confined in the penitentiary of this State under seven different convictions for felony, applied to the Governor for pardon, and, on the twenty-fifth day of August, 1886, the Governor issued his charter for pardon to cover each of the seven convictions, which charter of pardon he delivered to the agent of the relator, who in turn delivered it to the superintendent of the penitentiary, and demanded upon it the release of the relator. The superintendent, acting upon telegraphic orders from the Governor, refused to release the relator, retained the said charter of pardon, and subsequently returned it to the Governor, who indorsed upon it his order of cancelation because it "was issued upon misinformation." On the thirtieth day of March, 1887, the relator sued out a writ of habeas corpus, and upon the hearing of the same he introduced in evidence the said charter of pardon, indorsed as above stated. He was remanded to custody, and appealed to this court. Upon the hearing of the appeal this court held that a pardon procured by fraud was absolutely void, and that, having relied upon the charter of pardon, indorsed as above, the relator established against himself a *prima facie* procurement of the pardon by fraud and assumed the burden of proving no fraud, which, failing to do, he was not entitled to release, and the judgment of the lower court was affirmed. On the tenth day of August, 1887, the relator applied for a second writ of habeas corpus, which, being granted and heard, he was again remanded to custody, from which judgment he prosecutes this appeal. The Assistant Attorney General moves to dismiss this appeal because there is a former and unreversed adjudication upon this same state of facts, and because the said former adjudication was pleaded in bar, and no newly discovered evidence is set up as a reason for opening up the former judgment for revision. But *held*:
1. A second writ of habeas corpus is obtainable under the laws of this

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State when it is made to appear that important testimony has been obtained which, though not newly discovered, or which, though known to the applicant, could not be produced by him at the former hearing. 2. In passing upon second appeals in habeas corpus cases this court is not called upon to determine whether or not the evidence is newly discovered, but will consider the evidence as it was adduced on the hearing and is presented in the record. The motion to dismiss the appeal is overruled. See the opinion in extenso for the substance of evidence adduced on the hearing below, which is held to remove the taint of fraud in the acquisition of the pardon as exhibited on the first hearing, and, therefore, to entitle the applicant to his discharge.

HABEAS CORPUS on appeal from the District Court of Travis.
Tried below before the Hon. A. S. Walker.

The opinion discloses the case.

W. K. Makemson, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This court is asked to review a second judgment remanding the relator to custody.

The facts attending the first application for the writ of habeas corpus were, briefly, these: The relator, being confined in the State penitentiary under seven sentences, applied for and received from John Ireland, the Governor of the State of Texas, under date of August 25, 1886, a full pardon for each and every offense. This proclamation of pardon was handed to, and accepted by, the attorney of the relator, for and on his behalf, who, on August 29 next thereafter, turned over the pardon to the father of the relator. On the following day, August 30, he presented the pardon to the penitentiary officials and demanded the release of the relator; but they refused and retained the pardon, giving as a reason therefor the receipt of a telegram or telegrams from the Governor ordering said action. The pardon was returned to the Governor, who indorsed thereon the following: "Issue an order canceling this, as having been issued on misinformation."

On March 30, 1887, the relator sued out his first writ of habeas corpus, upon a hearing of which he was remanded to custody, from which he appealed to this court. Upon that appeal we held that a pardon procured by fraud was absolutely void, and that, having relied upon the pardon with its indorse-

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ment, the relator established against himself, *prima facie*, the procurement of the pardon by fraud, and assumed the onus of proving no fraud; and that, failing to do this, the court did not err in remanding him to the penitentiary. (Rosson v. The State, 23 Texas Ct. App., 287.)

On August 10, 1887, the relator again applied for the writ, and had a hearing on September 5, which resulted in his again being remanded to custody. The petition alleges the before-mentioned facts relative to the issuance of the pardon and the endorsement thereon. Fraud and misrepresentation are expressly denied; and it is further alleged that on January 18, 1887, the then governor—Ireland—issued to relator another pardon, which was intended to take the place of the former in all respects; but that, by a clerical omission, it in fact covered only one of the seven cases. It is further alleged that on the former trial of the writ the question of fraud was only raised in the Court of Appeals; but that when it was heard in the district court, Governor Ireland was absent from the State, and it would on that account have been impracticable to obtain his testimony to rebut the presumption of fraud had the question been raised.

The petition has attached to it as an exhibit the affidavit of ex-Governor Ireland, in which he affirms that the said indorsement on the pardon was made in consequence of representations made to him, which were promised to be substantiated by proof, but that the proof was never furnished, and that no fraud was used upon him to procure the pardon. It also fully substantiates the allegation of the petition which relates to the second pardon, which was to replace the first. This affidavit was by agreement made evidence in the case.

The Assistant Attorney General moves the court to dismiss this appeal, upon grounds substantially these: Because there is a former and unreversed adjudication upon the same state of facts; that this former adjudication was pleaded in bar and that no newly-discovered evidence is set up as a reason for opening up the former judgment for revision.

In Foster's case (5 Texas Ct. App., 625), this court held that the statute conferred the right of obtaining a second writ of habeas corpus "where important testimony has been obtained, which, though not newly discovered, or which, though known to him, it was not in his power to produce at the former hearing." The testimony of ex-Governor Ireland, under the allegations and proof as to the cause of its non-production upon the hearing of

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the first writ, comes fairly within the rule laid down in that case. It was further held in the Foster case that, on an appeal in a case of this character, the case "must be determined, not upon the questions as to whether the evidence is newly-discovered, but upon the evidence as we find it adduced on the hearing and presented in the record." We think the rules laid down in that case, and which have been applied to cases subsequently arising, dispose of the grounds of the motion so ably and earnestly presented by the Assistant Attorney General.

Coming to the consideration of the merits of the appeal, a case is presented wherein the taint of fraud is removed from the proclamation of pardon, by the testimony of ex-Governor Ireland, who, as the then chief executive of the State, made the indorsement which this court held on the appeal from the first judgment to be prima facie evidence of fraud in the procurement of the act of executive clemency. In that case it was held that this prima facie case might be rebutted by evidence showing that no fraud or misrepresentation had been used. The only testimony on that issue is that of ex-Governor Ireland, W. H. Rosson, the father of the relator, and W. K. Makemson, the attorney who represented the relator in the matter of procuring the pardon. The testimony of each of these emphatically negatives the use of fraud or misrepresentation of any character.

Having determined that the facts exist which give this court jurisdiction to hear this appeal, and that the presumption of fraud was removed by the evidence stated, we conclude that the original pardon is of full force and effect, and that the relator is entitled thereunder to be discharged from further confinement in the State penitentiary. The judgment is accordingly reversed, and it is ordered that the relator be discharged from confinement in the penitentiary.

Ordered accordingly.

Opinion delivered November 9, 1887.

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No. 2689 and 2690.

CLEM WELLS v. THE STATE.

1. **LOCAL OPTION LAW.**—This court held in Sublett's case, 23 Texas Court of Appeals, 309, that the local option law as adopted in Rockwall county, Texas, in January, 1877, was absolutely void, because it was adopted at an election held under an order of the commissioners court of said Rockwall county issued at a meeting of said court subsequent to its first meeting after the petition for such election was filed in said court. This conviction having been had for a violation of the local option law as adopted at said election, it is an absolute nullity.
2. **SAME.**—It is a settled rule in this State that "the repeal of the local option law by the prescribed mode, pending an appeal from a conviction for its violation while in force, annuls the conviction." This conviction, under this rule, would be a nullity.

APPEAL from the County Court of Rockwall. Tried below before the Hon. A. R. Hartman, County Judge.

The opinion states the nature of the cases. The penalties assessed were fines of two hundred dollars in each case.

W. C. Jones and Wade & Hefner, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. These two appeals are from judgments of conviction for violations of "the local option law," supposed to have been adopted in Rockwall county at an election held the sixth of January, 1877. These convictions were had in the county court, on the eighth and ninth days of March, 1887, respectively. Subsequently thereto, to wit, on the twenty-third day of April, 1887, this court, in the case of *Ex parte Sublett*, declared the local option law, as adopted in said county January 6, 1877, absolutely void, for a failure of compliance in its adoption with the mandatory provisions of the local option statutes. (23 Texas Ct. App., 309.)

It is further made to appear in the transcript of the record, in these cases, by the certificate of the county judge of said county, that, since the Sublett decision, *supra*, declaring the old law of

Statement of the case.

1877 absolutely void, the citizens of Rockwall county, at an election held the fourth day of June, 1887, to determine the question anew, defeated local option in said county, the majority against prohibition being one hundred and sixteen votes. In *Whisenhunt v. The State*, 18 Texas Ct. App., 491, it was held to be a settled rule "that the repeal of the local option law by the prescribed mode, pending an appeal from a conviction for its violation while in force, annuls the conviction."

In view of the status of these cases, considered in reference to these decisions, the Assistant Attorney General confesses errors, and the judgments are reversed and the prosecutions are dismissed.

Reversed and dismissed.

Opinion delivered November 9, 1887.

No. 2485.

BOB WHITE v. THE STATE.

PLEADING—THEFT OF PROPERTY OF A CORPORATION—INFORMATION OR INDICTMENT FOR THEFT of the property of a corporation must not only describe the corporation by its correct corporate name, but should allege that it was a corporation. Allegation that the "Mo. P. Rway Company" was the owner of the stolen property will not suffice. See the opinion in *extenso* for a discussion of the question, and for the substance of an information held insufficient to charge the offense of theft.

APPEAL from the County Court of Rains. Tried below before the Hon. W. M. Lamb, County Judge.

The opinion discloses the case. The penalty assessed against the appellant was a fine of twenty-five dollars and confinement in the county jail for forty-eight hours.

One Jeff Martin was joined in the information against this appellant, and, upon his separate trial, he was convicted and a like punishment assessed against him. The judgment in his case was reversed and the prosecution dismissed for the same reasons assigned in this case.

24	231
29	222
24	231
30	540
24	231
39	535

Opinion of the court.

E. W. Terhune, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Appellant was convicted upon an information based upon a complaint charging him and one Martin jointly with the theft of one hundred and fifty pounds of stone coal, of the value of sixty-seven and one-half cents. In the complaint it is alleged the coal "was the property of the Mo. P. Rway Company," and that it was taken "from the possession of Burt Temple, who was holding the same for the said Mo. P. Ry Company, without the consent of the said Burt Temple and the said Mo. P. Ry Company, or either of them, and with the intent to deprive the said Mo. P. Rway Company of the value thereof," etc.

In the information the alleged owner is styled "the Mo. P. Ry Company," and this is the name used throughout to designate the owner. A motion to quash, which was overruled, raised two objections to the information, in substance, 1, that there was a fatal variance between the allegations in the complaint and the information as to the name of the owner; and, 2, that neither the complaint nor information describes the owner sufficiently; and that if the letters used be sufficient to designate the Missouri Pacific Railway Company, as seems to have been intended, then the allegation is further defective and insufficient in that it does not allege that said railway is a corporation duly incorporated.

As to the complaint, we think that its allegations were inconsistent and repugnant in themselves. It alleges the ownership to be in "the Mo. P. Rway Company," but that the property was taken from, without the consent of, and with intent to deprive "the Mo. P. Ry Company" of the value of the same. Now, do the letters "Mo. P. Rway" and "Mo. P. Ry." designate the same company? It is extremely uncertain whether they do or not. If they do not, then the ownership is in a company whose want of consent to the taking is not alleged, and the want of consent and intent to deprive are made to apply to a party or company which did not own the property. To say the least of it, the pleading is vague and indefinite, and few better illustrations, perhaps, could be given of the importance and necessity of stating in full without abbreviation, unless explained in connection therewith the name of the company or

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corporation intended to be designated. If initials can be held sufficient, then which of the two forms of initials set forth in the complaint shall we take as the true one? If we select "Mo. P. Rway" as the owner, then it is apparent that it does not correspond with, and that there is a variance in letters between it and the "Mo. P. Ry," alleged as owner in the information.

The matter may be solved by determining whether in a criminal prosecution the name of a company or corporation should be set out in full, and, if a corporation, whether it be further essential that it be alleged that it was incorporated. We have no special criminal statute upon the subject. Our statute as to the allegation of the name of the defendant or of any other person necessary to be stated in the indictment, evidently refers to individuals, and does not embrace companies or corporations. (Code Crim. Proc., art. 425.) In short our code of procedure is silent, and, having failed to supply us a rule, we are relegated to the common law. (Code Crim. Proc., art. 27) and approved precedents.

Mr. Bishop says: "An indictment against a corporation properly describes it by its corporate name." And again: "The indictment should show on its face that a name in it is a corporation's, if such in fact." (1 Bish. Crim. Proc., 3 ed., sec 682.) In his work on criminal pleading and practice (8 ed.) Mr. Wharton says, in section 110: "When the name of a corporation is given, the corporate title must be strictly pursued unless specification is made unnecessary by local statute;" and in a note to this section he says: "Whether at common law in an indictment for stealing the goods of a corporation it is requisite to aver that the corporation was incorporated has been much disputed. That it is necessary is ruled in *The State v. Mead*, 27 Vermont, 722; *Cohen v. The People*, 5 Park. C. R., 330; *Wallace v. The People*, 63 Illinois, 451; *The People v. Schwartz*, 32 California, 160." He cites a number of decisions to the contrary, which we omit.

In his work on criminal law the same learned author says: "Goods belonging to a corporation must be laid as the property of the corporation by its corporate name and not as the property of the individual corporators, though they be all named." (1 Whart. Crim. Law, 8 ed. sec. 941.) In 2 Archbold's Criminal Pleading, 359, it is said, "the property of a corporation aggregate must be laid in the corporation in its corporate name;" and this same doctrine is declared in 2 Russell on Crimes, page 100.

In regard to pleading in civil cases, it is provided by statute

Opinion of the court.

that the act of incorporation need not be set out at length, "but it shall be sufficient to allege that such corporation was duly incorporated." (Rev. Stats., art. 1190, amended by act 18th Leg., regular session, p. 103.)

This question, in so far as we are aware, has arisen, even incidentally, in but one case which has been adjudicated in the courts of last resort in this State. In Price's case, 41 Texas, 215, the defendant was indicted for the theft of a bale of cotton from the train of the Houston & Texas Central Railroad Company, being property of said company. It was objected that the proper name of the company was the Houston & Texas Central Railway Company. Roberts, Chief Justice, says: "It was not necessary to set out the charter in the indictment, or to allege it to be a chartered company otherwise than by name, as was done in this case." As shown by the authorities we have quoted above, this decision was not in harmony with the most approved doctrine, in so far as it holds that it is unnecessary to allege that the company is a corporation. We are of opinion that such allegation is requisite, and, to say the least of it, it is beyond doubt the better practice.

But in this case certain initials only are given, and the name of the company is not pretended to be, or even substantially given, as might, with some plausibility, have been claimed in the Price case. How can this court say what the Mo. P. Rway Company is?

We are of opinion, for the reasons given, that both the complaint and information are insufficient to support the prosecution and conviction. Wherefore the judgment is reversed, and the prosecution under said complaint and information is dismissed.

Reversed and dismissed.

Opinion delivered November 9, 1887.

Statement of the case.

24 235
28 107

No. 2452.

MARTIN GUEST v. THE STATE.

1. **THEFT—INTENT—CHARGE OF THE COURT.**—Felonious intent is the essential ingredient of theft, and, to constitute that offense, the taking must, in the first instance, have been fraudulent, and if the possession be obtained lawfully, no subsequent appropriation, however fraudulent the intent, will suffice to constitute the taking theft, unless such lawful possession was obtained by means of false pretext, or with the fraudulent intent, at the very time of the taking, to deprive the owner of the value of the property and appropriate the same to the use and benefit of the taker. See the opinion for a requested charge, which, harmonizing with this doctrine, was, in view of the facts in proof, erroneously refused.
2. **SAME.**—Note a case in which the trial court should have given in charge to the jury the established doctrine, that, "in cases where there is evidence from which the jury might infer that the taking was not fraudulent, it is the right of the defendant to have them clearly instructed as to the distinction between trespass and theft."

APPEAL from the District Court of Red River. Tried below before the Hon. D. H. Scott.

The conviction in this case was for the theft of four head of cattle, the property of John R. Johnson, in Red River county, Texas, on the fifteenth day of April, 1887. A term of two years in the penitentiary was the penalty assessed against the appellant.

John R. Johnson was the first witness for the State. He testified that he lived in Red River county, Texas, and was the owner of the four head of cattle described in the indictment. Those animals were taken from their range, near witness's ranch place, in Red River county, Texas, about the middle of April, 1887. They were then in the witness's possession, and were taken without his knowledge or consent. On a certain Sunday in the said April, a Mrs. Johnson, who then lived on the defendant's ranch, gave the witness information which led him to believe that the defendant had the animals. Accordingly, on the following Friday, the witness went to the ranch of Mr. Jack Garner, which was situated in the edge of Lamar county, about twenty-five miles distant from the witness's ranch. At Garner's ranch the witness found Jack Garner, defendant and

Statement of the case.

several persons whom he did not know. Witness asked the defendant about his four head of cattle, and the defendant replied either that he had one or had some of them. In the same connection the defendant said that, when he left the range with his own cattle, the four head belonging to witness forced their way into his herd, and that, although he cut them out several times, he could not keep them from rejoining his herd; that finally, when they had followed his herd beyond the limits of the range, he gave up his attempts to exclude them from his herd, fearing that if he left them beyond the range they would stray off and be lost to witness, and that he drove them from that point with his herd, intending either to pay witness for them, or to replace them to witness with other animals of like character and value, which he claimed to have on the witness's range. At the same time and place the defendant proposed to pay witness for the cattle, or to replace them with other animals on the range, or to drive them back whence he got them, as witness should elect. Witness preferred his own animals, whereupon defendant delivered them to witness, and helped him drive them a part of the way back to their accustomed range. Three of the animals had been placed in the J G brand, which the witness understood was Jack Garner's brand. One of those three animals was a bull when taken, but had been altered when recovered. The fourth was a cow. She had not been rebranded. The witness's brand was a J. That letter on the yearling, one of the three animals rebranded, was almost entirely obliterated by the J in the J G brand, which was placed over it. The several parties at Garner's ranch, except the defendant, were branding cattle when the witness reached the ranch. Defendant was then eating a meal, and was taking no part in the branding. Defendant told witness that he had sold the cattle to Jack Garner. Thirty or forty head of defendant's cattle were in the bunch driven from the range frequented by witness's cattle. Defendant left some cattle on that range, but witness did not know how many. The cattle of the defendant and those of the witness ran on the same unfenced range, and the houses of their respective herders were about two miles apart. The bull had just been castrated, and he and the two other animals freshly branded and marked, when witness reached Garner's ranch. Defendant told witness that he had intended to return to the range on the following Sunday to notify witness of his having witness's cattle. The cattle were thin when

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taken. The road over which the witness was told the cattle were driven was a public road. Defendant was well acquainted with witness's cattle. Jack Garner, to whom the defendant sold the cattle, was the defendant's brother-in-law.

C. M. Palmer was the next witness for the State. He testified that he was well acquainted with the defendant and J. R. Johnson, and knew their respective stocks of cattle, which ran on the same range in Red River county. On the day prior to the alleged theft, the witness, being then on the range, saw the defendant and Mr. Catchings, who worked for defendant, driving a small bunch of cattle from the range towards the defendant's stock lot. That bunch included two of defendant's cattle, and seven or eight head which belonged to J. R. Johnson. Witness particularly noticed in that bunch a certain cow and yearling belonging to Johnson. They were two of the animals afterwards recovered by Johnson in Lamar county and brought back to the range. Neither defendant nor Catchings made any effort to cut Johnson's cattle from the bunch while witness saw them driving the animals, nor did defendant direct witness to tell Johnson that he, defendant, had driven the cattle, or that he could not separate them from his herd. Johnson's cattle were not following defendant's cattle when witness saw them, but were being driven along in the usual way. Witness thought at the time, to save trouble and labor, defendant was driving the bunch to his stock pen, where he would pen his own and exclude Johnson's animals.

Mrs. Martha Johnson testified, for the State, that, at the time of the alleged offense, she was living at the defendant's ranch house, about a mile and a half distant from J. R. Johnson's ranch house. Witness had a distinct recollection of the day that defendant drove off a part of his cattle. Defendant and his two employes, Catchings and Richardson, drove some of Johnson's cattle to the pens with some of defendant's animals. They penned those belonging to defendant, but did not pen the seven or eight head that belonged to Johnson. When they left, they turned defendant's thirty or forty head out of the pen and started to Lamar county with them. Witness learned, but did not know of her own knowledge, that some of Johnson's animals broke into defendant's herd, after the herd was started off. Witness saw the herd when defendant turned it out of the pen and started off, but did not know whether or not it included any of Johnson's cattle. Defendant left no word for Johnson with the witness. Mr. Johnson at that time lived about fifteen miles

Statement of the case.

from where the cattle were taken. The witness sent him word that it was important to him to come and see her about his cattle. He came, and witness told him that his cattle had been taken away.

James E. Catchings was the next witness for the State. He testified that he was in the defendant's employ at the time of the alleged offense, and assisted him to gather the cattle driven to Garner's, and went with him about nine miles on his trip to Garner's. Several of John R. Johnson's cattle got into the herd while they were being gathered. This was before the start to Garner's. Just before reaching defendant's pen with the herd then gathered, two animals broke from the herd and ran to a bunch of Johnson's cattle near Johnson's ranch. Witness and defendant went after and drove those animals to the pen, but penned only defendant's cattle, leaving Johnson's outside. Defendant drove off between forty and fifty head of cattle, leaving some that he owned on the range. None of Johnson's cattle were in the herd when defendant left his house for Garner's, but before he got out of the range several joined the herd despite the efforts of the defendant and witness to keep them out. They were cut out several times, but got back into the herd. When witness turned back to go home, one of his yearlings and Johnson's four cattle were cut out of the herd for witness to drive back to the range. Witness's yearling, however, ran off through the brush, and witness followed it, abandoning Johnson's four cattle. He did not know what became of Johnson's four head. He drove his own yearling home. Defendant made no effort to pen Johnson's cattle at any of the houses passed on the road, nor did he leave any word for Johnson that witness knew of.

James Harrell testified, for the State, that he lived on the public road (a lane at his place), about two miles from the range of Johnson's and defendant's cattle. The witness was at home on one Sunday morning in April, 1887, when the witness Catchings and another man drove a herd of forty or fifty head of cattle by his house. There was a good lot at witness's place, directly on the roadside. No attempt was made by Catchings or the other man to pen any cattle in that pen. Catchings passed witness's house going back towards defendant's ranch, after he had had time to go about six miles with the herd. If he then had a yearling with him the witness did not see it. Witness's house was about two hundred yards from the public road, and he could and did plainly see Catchings from that house when he passed going

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back from the direction in which the herd was taken. The herd in charge of Catchings and the other man passed witness's house between ten and eleven o'clock. No loose cattle were then following the herd.

J. B. Butler testified, for the State, that defendant, Catchings and Richardson drove a herd of forty or fifty head of cattle by his house, on a Sunday, about the middle of April, 1887. Witness knew Johnson's cattle, but took no special notice of the cattle in the herd described. Witness's cattle lot stood about one hundred and fifty yards from the road over which the cattle were driven. Neither defendant, Catchings nor Richardson said anything to witness about putting cattle in that lot. The witness left home soon afterwards, and did not see Catchings going back. The State closed.

Calvin Richardson was the first witness for the defense. He testified that in April, 1887, he went on a visit to the neighborhood in which the ranches of the defendant and John R. Johnson were located. Defendant employed witness to help him gather a bunch of cattle and drive them to Garner's pasture, near Blossom Prairie, in Lamar county. When collecting cattle at defendant's ranch on Sunday morning, two steers stampeded from the bunch and ran to a point near Johnson's ranch. There they joined some of Johnson's cattle, and all the animals were driven to defendant's pen, where they were separated and defendant's animals penned and Johnson's left outside. Defendant's herd was then turned out and started to Blossom Prairie. None of Johnson's cattle were started with them, but four head persistently followed and broke into the herd, and, though they were cut out several times, they could not be kept out. They were cut out the last time with Catchings's yearling, when Catchings started back to defendant's ranch. The four head soon rejoined the herd. This being about nine miles from the starting point, defendant said he would not cut them out again, as they would not go back to the range from there, and that he would either pay Johnson for them or replace them. The herd was then driven to Garner's place near Blossom Prairie, where witness heard defendant tell Garner that the herd contained four of Johnson's cattle, but that he would make it all right with Johnson by paying for or replacing the cattle. Garner's was reached on Sunday evening. When witness left to return to defendant's ranch on the next day, the defendant told him if he saw Johnson, to tell him about the four head of cattle, and that

Statement of the case.

he, defendant, would be back on the following Sunday, and make it all right with him. On the following Wednesday witness saw Johnson, and told him in part, but not all, of what defendant said. Witness remembered that he asked Johnson not to use his name, as defendant owed him, and he was afraid he would not get his pay. On his cross examination, this witness said that defendant told him, if he heard Johnson inquiring for his cattle, to tell him, Johnson, that he, defendant, would make it all right.

J. N. Garner testified, for the defense, that the defendant got to his place in Lamar county on the evening of the day he left home with the cattle. He delivered the herd to witness, the witness having purchased them, and told the witness at the time that four of Mr. Johnson's cattle were in the herd; that they broke into the herd despite his efforts to keep them out, but that he would either pay Johnson for the animals or replace them, as Johnson might elect. Witness was branding, marking and castrating the cattle when Johnson reached his ranch. He heard defendant explain to Johnson how the cattle got into his herd, and tell Johnson that he was ready to pay for, replace or drive the cattle back to the range. He also heard defendant tell Richardson, when Richardson left witness's house, to tell Johnson about his four animals, and that he would be home on Sunday and pay him for them. The defense closed.

J. R. Johnson, recalled by the State, testified, in rebuttal, that he met Richardson, whom he did not know, on the Wednesday following the theft of the cattle. In reply to questions, Richardson told him that the defendant took the cattle, and in that connection requested witness not to mention his name in a manner that defendant would hear of it; that the defendant had not yet paid him, and that he feared if the defendant found out that he had given him away, defendant would get mad and not pay him. He said nothing about the cattle breaking into defendant's herd, or being cut out, or that defendant had told him to tell the witness that he would be home Sunday and pay for the animals.

The motion for new trial raised the questions discussed in the opinion.

Sims & Wright, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

Opinion of the court.

WHITE, PRESIDING JUDGE. As directly and pertinently applicable to the facts proven on the trial, we are of opinion the court erred in refusing the first special instruction asked for defendant, as follows, viz.:

"In order to convict the defendant of the crime charged in the bill of indictment, you must be satisfied beyond a reasonable doubt that he not only did appropriate the cattle of J. R. Johnson, as alleged in the bill of indictment, but that the intent of the defendant to deprive the owner of the value thereof (if you should find that such intent existed) existed at or before the taking; and in this connection I further charge you that, if you should find from the evidence that the cattle alleged to have been stolen followed defendant and got into his herd, and that afterwards he formed the idea of fraudulently appropriating the same to his own use and benefit, he could not be convicted of theft." There was no similar instruction embraced in or covered by the the general charge. Under our statute, "the taking" essential to constitute theft "must be wrongful; so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft." (Penal Code, art. 727.)

The felonious intent is the essential ingredient of the crime, and, "to constitute theft, the taking of the property must, in the first instance, have been fraudulent; and, if the possession be obtained lawfully, no subsequent appropriation, however fraudulent the intent, will suffice to constitute the taking theft, unless such lawful possession was obtained by means of a false pretext, or with the fraudulent intent at the very time of the taking to deprive the owner of the value of the property and to appropriate the same to the use or benefit of the taker." (Hernandez v. The State, 20 Texas Ct. App., 151; Morrison v. The State, 17 Texas Ct. App., 34; Atterberry v. The State, 19 Texas Ct. App., 401; McAfee v. The State, 14 Texas Ct. App., 668; Johnson v. The State, 1 Texas Ct. App., 118; Spinks v. The State, 8 Texas Ct. App., 125.)

Under the particular facts proven in this case, we are further of opinion that the charge did not present the law applicable to an important phase of the case. It is a rule well settled that, "In cases where there is evidence from which the jury might infer that the taking was not fraudulent, it is the right of the defendant to have them clearly instructed as to the distinction

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between trespass and theft." (Bray v. The State, 41 Texas, 203; Ainsworth v. The State, 11 Texas Ct. App., 339.)

We will not discuss the facts (which the Reporter will give fully), but content ourselves with the remark that, upon the matter of fraudulent intent at the time of taking, or whether they establish sufficiently a fraudulent intent at all, is a matter of very serious doubt in our minds.

For errors in the charge, as above pointed out, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered November 9, 1887.

No. 2580.

THOMAS HUTCHINGS v. THE STATE.

1. **PRACTICE—SCIRE FACIAS.**—The object of the scire facias in a criminal case is to bring the sureties into court to show cause why judgment should not be entered against them upon the bond already forfeited, and it is not essential that the writ shall embrace the principal in the bond.
2. **SAME—AMENDMENT.**—The rules which regulate and control the amendment of a citation and petition in a civil case apply to a scire facias case. Moreover, it is essential that the scire facias, in cases like the present, should show on its face, either by original or amended averment, that there is, in fact, no actual, though there may be an apparent, variance in the names of the parties to the bond. The trial court did not err in permitting the scire facias to be amended to show that the John McCulloch described therein was the W. J. McCulloch who signed as the principal in the forfeited bond.
3. **SAME—NOTICE—CASE DISTINGUISHED.**—It is not a sufficient objection to the proceedings in a scire facias case that the trial court permitted such an amendment of the scire facias without notice to the principal in the bond. Note the opinion for the distinction between this and Collins's case, 16 Texas Court of Appeals, 274.
4. **SAME—JURISDICTION OF THE COUNTY COURT OF TITUS COUNTY.**—It is a well settled general rule that final judgments upon forfeited bail bonds can not be rendered at the criminal terms of the county courts. But see the opinion in extenso for a summary of the legislation which is held to operate as an exception to the rule in favor of the criminal county court of Titus county, and to specially confer on it jurisdiction to render final judgments upon forfeited bail bonds.

24	242
34	553
24	242
38	148

Opinion of the court.

APPEAL from the County Court of Titus. Tried below before the Hon. J. R. Riddle, County Judge.

The opinion states the case. The amount of the bond adjudged was one hundred dollars.

G. F. Conley and W. H. Baldwin, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. An information was brought by the county attorney of Titus county against John McCulloch and one Beardon, charging them jointly with the theft of one side of sole leather of the value of four dollars. McCulloch was arrested and executed an appearance bond, which he signed W. J. McCulloch instead of John McCulloch. Thomas Hutchings, this appellant, signed said bond as surety. McCulloch failing to appear at court, as he had bound himself to do, the bond was forfeited and judgment nisi rendered against him and the surety. Scire facias issued to the surety. Objection having been made to the writ for variance between it and the bond as to the name of the principal obligor, the same was amended on motion of the county attorney; the amendment setting up the fact, in substance, that John and W. J. McCulloch were one and the same party.

Two objections are urged to the legality of the scire facias and its amendments. To the scire facias it is urged that it did not issue against McCulloch, the principal, as well as the surety, Hutchings. This objection is not tenable. The scire facias writ in criminal cases subserves the purpose both of a petition and citation, and its object is to bring the sureties, and not the principal, into court to show cause why judgment should not be entered against them upon the bond which has been already forfeited. It is true the judgment must be against the principal as well as the sureties (Code Crim. Proc., art. 441), but it is expressly provided that, in issuing the citation or writ of scire facias, it shall not be necessary to give notice to the defendant. (Code Crim. Proc., art. 442.) The principal need not be served with notice. (Branch v. The State, 25 Texas, 423.)

As to the amendment of scire facias, it is well settled that it is not only subject to the same rules as a citation and petition in a civil case, but it is absolutely essential that it should show

Opinion of the court.

on its face, by proper averment, either originally or by amendment, in a case like the present, that there is in fact no actual, though there may be apparent, variance in the names of the parties to the bond. (*Cassiday v. The State*, 4 Texas Ct. App., 96; *Loving v. The State*, 9 Texas Ct. App., 471; *Weaver v. The State*, 13 Texas Ct. App., 191; *McIntyre v. The State*, 19 Texas Ct. App., 441.)

There was no error in permitting the amendment, and, in so far as the proof upon that issue is concerned, it fully identified John and W. J. McCulloch, who signed the bond, as one and the same individual. (*Vidauri v. The State*, 22 Texas Ct. App., 676.)

But another objection urged is that the amendment of the writ was made without notice to the principal in the bond, and we are cited by appellant's counsel, in support of the objection, to *Collins v. The State*, 16 Texas Court of Appeals, 274. That was a case in which the effort was made to amend a judgment nisi after expiration of the term at which it was rendered, and it was held that, inasmuch as the principal in the bond was directly interested in the judgment, he was a necessary party in proceedings to amend it, and that it could not be properly nor legally amended without due notice to him. (*Madison v. The State*, 17 Texas Ct. App., 479.) This is a different case. Here the object was to amend, not the judgment nisi, but the scire facias—a writ in which the principal was in no manner, and the sureties alone were, interested. This objection is without merit, because the sureties were in court and contesting the proceedings for themselves alone in a matter where the principal had really no interest.

Again a most serious objection to the judgment final as rendered in this case is that the same was rendered at a criminal, and not at a civil, term of the county court, and that, under the now well settled rules of procedure, judgments final on forfeited bail bonds can not be rendered at the criminal terms of the county court. (*Hart v. The State*, 13 Texas Ct. App., 555; *Jones v. The State*, 15 Texas Ct. App., 82; *Reddick v. The State*, 21 Texas Ct. App., 267.) This is the ordinary general rule, but to it the county court of Titus county appears to have been made an exception, under the law restoring and defining its jurisdiction. In 1881, by act of the regular session of the seventeenth Legislature, General Laws, page 3, Titus was one of a number of counties which were divested of jurisdiction in their county courts for the trial of civil and criminal causes. But by act

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approved April 13, 1883 (General Laws, 18th Leg., Reg. Sess., p. 91), the *criminal* jurisdiction of said county court was again restored, not only conferring exclusive original jurisdiction of most misdemeanors, but further specially providing as follows, viz:

"SEC. 2. Said county court shall have jurisdiction in the forfeiture and judgment of all bonds and recognizances taken in criminal cases of which said criminal cases said court has jurisdiction," etc. "Sec. 3. The district court of said county of Titus shall no longer have jurisdiction of cases of which the county court of said county by the provisions of this act has original or appellate jurisdiction." We think it clear from these provisions that the Legislature intended to restore, with the criminal jurisdiction conferred, full authority and jurisdiction to dispose finally of all forfeitures on bonds and recognizances in criminal cases. Such being the law, the court did not err in forfeiting and rendering judgment final in this case.

We find no error in this record for which a reversal should be had, and the judgment is therefore affirmed.

Affirmed.

Opinion delivered November 9, 1887.

No. 2675.

LEE CONNER v. THE STATE.

1. **THEFT—EVIDENCE—POSSESSION—VARIANCE.**—The indictment charged the possession and ownership of the alleged stolen horse to be in one J. C. B. The proof showed that the animal was taken by the accused from a place at which one Bull had hopped it by direction of D. H. B., who had borrowed the horse from J. C. B. *Held*, that the proof established the possession in D. H. B., and that the variance between the allegation and proof on the issue of possession is fatal to the conviction.
2. **SAME—CONSENT.**—The proof showed that, for the purpose of detecting the accused in the very act of theft, the horse was hopped with the expectation and the intent that defendant would take him. It was contended by the defense that the proof established a taking with the consent of the owner. *Held*, that the position is without merit, as the owner in no way suggested the theft to the accused nor induced him to commit it.

24	245
29	103
24	245
34	75

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3. SAME—ASPORTATION.—Neither asportation nor actual manual possession of the property is, under our code, essential to constitute theft.

APPEAL from the District Court of Coleman. Tried below before the Hon. J. C. Randolph.

The conviction in this case was for the theft of a horse, the possession and ownership of which was alleged to be in one J. C. Benton. A term of five years in the penitentiary was the penalty assessed by the verdict.

J. L. Nickel was the first witness for the State. He testified, in substance, that in June, 1886, he lived in the Rough creek neighborhood, in Coleman county, Texas. On two or three different occasions, prior to the commission of the act for which the defendant was now upon trial, the defendant came to the witness and requested the witness to join him in the business of stealing horses and running them off to Lampasas county and selling them. Defendant said that sleek horses, worth seventy-five dollars each, could be stolen and sold to a good profit. Witness declined to join the defendant in the proposed enterprise. Some time in May, 1886, witness went to defendant and told him that he had lost two horses, which had either strayed or been stolen, and asked the defendant to go with him in search of the said horses. Defendant replied: "I know of a way we can do to beat that, and in which you can get even for the loss of your horses. We can steal a couple of horses, which will make up your loss, and be easier than hunting the horses you have lost." Defendant then proposed to steal the horses of the witness's brother-in-law. The witness then went to Mr. E. A. Birdwell and told him of the proposition made to him by the defendant to go into the horse stealing business. Birdwell advised the witness to agree to the next proposition of the kind made by the defendant, and to apprise him, so that he and others might take the defendant in the very act. On the morning of June 15, 1886, the witness went to the defendant's house, and the defendant renewed his proposition, and the witness, acting upon the suggestion of Birdwell, agreed. Defendant borrowed a saddle and rode a mule to the Rough creek bottom, to look for some horses to steal, witness accompanying him, not for the purpose of participating in the theft, but in pursuance of the agreement he had made with Birdwell. They found two horses hopped out, one a sorrel, branded JAC, and one a gray, branded BA. Witness

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and defendant examined those horses, and defendant said that they would do. Witness and defendant laid around the horses all day, at a point about two hundred yards distant. Defendant went to and closely examined the said horses two or three times during the said day. He asked witness during the day if the witness knew who owned the said horses, and witness replied truthfully that he did not. During the day the witness saw Mr. Bull, and went to him and asked him: "Ain't you on to the racket?" About dusk the bell on one of the horses got to ringing, and defendant remarked: "There they are." The witness and defendant rode to a point near the horses, when the defendant dismounted, with a rope in his hand, and went to the first horse, which he caught, but released. He then dropped his rope, caught the other horse around the neck, patted him and rubbed him down gradually towards the hobbles on his feet. He was in the act of removing the hobbles, when the men in ambush ordered him to hold up his hands. Defendant responded to the order with the exclamation "Oh!" The men then came in view, and were Bull, Birdwell, Townsend and Dave Benton. Defendant told them that the horses belonged to his uncle, and that if he could go to Buffalo Gap he would prove it. The men then asked him who owned the rope lying near. He first said that he did not know, but afterwards said that it was his.

R. C. Bull testified, for the State, that on or about June 15, 1886, two horses, belonging to J. C. Benton, were placed in his hands to be used as decoys in the detection of the defendant for horse theft. According to arrangements previously made, the witness took the said horses to a certain point in the Rough creek bottom and hopped them out. He then secreted himself in the vicinity and watched them. He saw the defendant and Nickel when they arrived on the ground. About dusk A. P. Townsend joined witness, and they secreted themselves behind some rocks not far from the horses. Defendant and Nickel soon came to the horses. Defendant went to the nearest horse, dropped his rope, and took the horse around the neck, but soon released him. He then went to the second horse, and was in the act of unhoppling him, when the witness stepped from his covert and ordered him to hold up his hands. Defendant exclaimed "Oh!" throwing up his hands, and then said that the horses belonged to his uncle, Jack Coggins. Witness asked defendant who owned the rope. He replied first that he did not know, but afterwards said that he did. The horses were on their accustomed range, but were

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hopped there to enable defendant to steal them, under an arrangement with Nickel to apprehend him in the act. On his cross examination, the witness said that the horses belonged to J. C. Benton, but were delivered to him by D. H. Benton, J. C.'s brother, for the uses to which they were put. Witness had the care and control of the horses during the day. Witness passed the defendant and Nickel at one time during the day.

D. H. Benton testified, for the State, that he was a party to the plan devised for the detection of the defendant in the act of stealing horses. On the night of June 14 he went to his brother, J. C. Benton, and asked the loan of the two horses. His brother told him to take them. He did not tell his brother his object in borrowing the horses. He turned the horses over to Bull on the morning of the fifteenth for the purpose of hopping them in the flat where the defendant could find and steal them. They were placed there by Bull with the intent and expectation that defendant would steal them. Witness joined Bull, Townsend and others in the flat after the arrest of defendant. Witness did not give defendant his consent to take the horses.

A. P. Townsend testified, for the State, that on June 15, 1886, Mr. Bull told him that defendant and Nickel were preparing to steal some horses, and divulged to him the scheme adopted to detect defendant in the very act. Witness joined Bull and staid with him until the arrest was made. He detailed the circumstances of the theft exactly as Bull did.

J. C. Benton testified, for the State, that his brother Dave came to him on the night of June 14, 1886, and asked the loan of his two horses. He did not say what he wanted with them nor how long he wanted them. Witness told him to take them, and considered he had lent them for an indefinite period. Witness did not then know what his brother wanted with the horses. He did not consent that defendant should take them.

E. A. Birdwell testified, for the State, that he was a party to the scheme devised to detect the defendant. That scheme was formulated upon information given to witness by Nickel that defendant had proposed to him to embark in the horse stealing business.

The State closed.

Mrs. M. M. Conner testified, for the defense, that on the morning of June 15, 1886, Nickel came to her house and asked her son Lee, the defendant, if he could go with him to help hunt his horses, and offered to pay him a dollar a day. Defendant replied

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that he had no horse to ride, but that, if he knew where he could find any of his uncle's horses, he would go. Nickel asked him what brand his uncle gave. He replied that he gave the half circle IV. Nickel then said that he knew where such horses could be found. Defendant then borrowed a saddle from Will Billings, and left with Nickel to hunt Nickel's horses. Witness gave defendant some money, telling him to bring her some coffee and sugar if he went by the store. After defendant's arrest, witness sent for and got the saddle borrowed from Billings, and found the coffee in one of the pockets.

Jack Coggins testified, for the defense, that he had several horses in Coleman county, branded half circle IV. He gave the defendant, his nephew, authority to handle, look after and use those horses.

The motion for new trial raised the questions discussed in the opinion.

Woodward & Vining, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. It is alleged in the indictment that the defendant did fraudulently take from the possession of J. C. Benton one certain horse, the same being the corporeal personal property of the said J. C. Benton. Both the ownership and the possession of the horse are alleged to be in J. C. Benton. It is shown by the evidence that, on the day before the alleged theft, J. C. Benton, the owner of the horse, loaned the same to his brother D. H. Benton. On the morning of the day of the alleged theft, D. H. Benton turned the horse over to a man named Bull, who took said horse to a place which D. H. Benton designated, and there hopped out the horse. It had been agreed between D. H. Benton, Bull and others to set a trap to catch defendant stealing horses, as they had been informed by one Nickel that defendant had proposed to him to go into the horse stealing business with him.

The plan agreed upon was to place J. C. Benton's horse where the defendant and Nickel, who, by an understanding had with D. H. Benton, Bull and others, was to keep with and act with the defendant, could and would be likely to find the same, and to keep a watch on said horse, so that when the defendant and said Nickel should take him, they could arrest the defendant in

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the very act of the theft. This plan to entrap the defendant, it appears, was not known to J. C. Benton, the owner of the horse, nor did he know for what purpose his brother had borrowed said horse.

Defendant took the horse, as it was anticipated he would, while said horse was hopped upon its accustomed range, but while it was in the immediate control and charge of said Bull, and while the bailment thereof to D. H. Benton still continued. It is insisted by counsel for defendant that there is a fatal variance between the allegation of possession and the proof, and we are of the opinion that the position is a sound one. It is clear, we think, that, at the time of the alleged theft, the horse was in the actual legal control, care and management of D. H. Benton under and by virtue of the bailment from J. C. Benton to him. D. H. Benton was legally responsible to J. C. Benton for the horse. He did not hold the horse as the servant or employe of J. C. Benton, the owner. It can not be said that the horse was in the mere temporary custody of D. H. Benton. It was in the mere temporary custody of Bull, because he was controlling and using said horse under the direction of, and subordinate to the control of, D. H. Benton, the bailee and special owner of said horse.

Under the facts of this case both the ownership and possession of the horse should have been alleged to be in D. H. Benton, and necessarily the *possession* should have been alleged to be in him. (Willson's Texas Crim. Laws, secs. 1258, 1272, 1373.) It can not be said that the horse was on its accustomed range and therefore in possession of the general owner, J. C. Benton. The horse was not loose upon the range, but was hopped and under the immediate surveillance of Bull. But if the horse had not been hopped, being under the care, control and management of D. H. Benton, the special owner, the constructive range possession would be that of the special and not the general owner. (Willson's Texas Crim. Laws, sec. 1273; Littleton v. The State, 20 Texas Ct. App., 168.)

With respect to the question as to the consent of the owner of the horse to the taking thereof, we do not think there was any such consent as would protect the defendant in the commission of the theft. The owner of the horse did not either directly or through another suggest the theft to the defendant, or induce the defendant to commit it. The facts of this case are unlike those of Speiden v. The State, 3 Texas Court of Appeals, 156, cited by

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counsel for defendant. *Johnson v. The State*, 3 Texas Ct. App., 590, and *Allison v. The State*, 14 Texas Ct. App., 122, and *Pigg v. The State*, 43 Texas, 108, are cases more in point.

As to the *taking* of the horse, we think the evidence sufficiently establishes it. Asportation of the horse was not essential to complete the theft. An actual manual possession of the property is not necessary to constitute theft under our code. (Willson's Texas Crim. Laws, secs. 1266, 1267, 1293.)

Because of the variance between the allegation and proof of possession, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered November 12, 1887.

No. 2639.

JAMES TILLERY v. THE STATE.

1. **MURDER—SELF DEFENSE—CHARGE OF THE COURT.**—The evidence on a murder trial disclosed that for a period long anterior to the homicide the deceased was at enmity with the accused; that he had repeatedly, without apparent probable or reasonable cause, charged the accused with a felony; that he had threatened to kill the accused; that he had conspired with one T. to kill the accused, and that, at the time of the homicide, he was acting together with T. in pursuance and furtherance of said conspiracy; that he and T. made an unsuccessful attempt on the night before the homicide to induce other parties to co-operate with them in the murder of the accused on that night, of which effort on the part of the deceased and T. the accused, on the same night, was informed; that on the next morning, immediately after a conference with T., the deceased, armed with a pistol, accosted the accused and again charged him with the felony; that the accused thereupon demanded that the charge be retracted by the deceased, when the deceased placed his right hand to his right side (where his pistol was afterward found), and the accused fired the fatal shot. *Held*, that the evidence fairly raised the issue of self defense, and authorized the court to charge the jury upon that issue; but that, as there was no evidence tending to show that the accused had forfeited his right of self defense by seeking and provoking the difficulty, the charge upon that issue was not authorized by the proof, was prejudicial to the accused, and was, therefore, erroneous.
2. **SAME.**—The rule prescribing the extent to which a person in emergency is authorized to act upon appearances of danger is as follows: If, from the standpoint of the slayer, it reasonably appeared to him, from the cir-

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28	215

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cumstances of the case, that the danger existed, and he acted under the reasonable belief that it did exist, he was justified in defending against it to the same extent, and under the same rules, as if the danger had been real. The charge in this case was erroneous, in that it limited such right of the accused to his *honest belief* that he was in danger, and erroneously made this idea prominent by reiteration.

2. **SAME—THREATS.**—The charge of the court is otherwise erroneous in that the instruction relating to the threats uttered by the deceased against the accused is disconnected from that portion of the charge which relates to self defense, whereas it should have formed a part of the instruction on the law of self defense, and should have been given in immediate connection with that issue. See the opinion in extenso on the subject.
4. **PRACTICE—EVIDENCE.**—It was competent for the accused to prove that the deceased had no probable cause to charge him with felony, and did not believe the charge to be true when he made it, but such proof could not be made by the statement of a witness that he investigated the charge of felony made by the deceased against the accused and discovered no evidence to support it, such statement being merely the conclusion of the witness.
5. **SAME.**—The defense in this case proposed to prove the declarations of T., the co-conspirator of the deceased, made subsequent to the homicide. *Held*, that the proposed proof was properly excluded, it being but hearsay, and not part of the *res gestæ*, nor admissible under the rule that the declarations of one conspirator, pending the conspiracy, are admissible against the other.
6. **SAME—PRIVILEGE OF COUNSEL.**—The evidence disclosing the complicity of T. with deceased in a conspiracy to kill the accused, denunciation of T. by counsel for the defense did not constitute a breach of the privilege of argument, but was authorized by the facts in proof. Such denunciation of T. could not warrant the prosecuting counsel to abandon the record in the case, and on his personal knowledge review T.'s connection with two subsequent homicides, in the first of which he was the slayer, and in the latter the slain, and both of which were wholly foreign to the case on trial.

APPEAL from the district court of Harrison. Tried below before the Hon. J. G. Hazlewood.

The indictment in this case was filed in the district court of Gregg county, Texas, on the twenty-third day of January, 1885. It charged the appellant with the murder of J. N. Allison, in said Gregg county, Texas, on the eleventh day of November, 1884. The venue of the case was changed to Harrison county, and at the August term, 1887, of the district court of the said Harrison county, the appellant was placed upon his trial, which resulted in his conviction of manslaughter, his punishment being assessed at a term of two years and six months in the penitentiary.

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William Reddick was the first witness for the State. He testified that he lived in the town of Longview, Gregg county, Texas. He had known the defendant about fourteen years, and, at the time of the death of Doctor Allison, had known him about nineteen years. The witness was in the town of Longview on the day that Doctor Allison was killed, but did not see the difficulty in which Allison was killed. He knew that a very bad state of feeling existed between the defendant and Allison, at the time of the latter's death. The witness had a conversation with the defendant on the Saturday night succeeding the election in November, 1884. In that conversation the defendant told witness that, having heard that Allison had accused him, defendant, of burning his, Allison's, store house, and had said that he, defendant, was not worthy to be looked upon as a gentleman, he approached Allison on election day, and asked him why he had made the statements referred to. He said that Allison refused to talk to him, and that he thereupon seized Allison's whiskers, and told him to stop, or that he would kill him; that he, defendant, was not guilty of burning the house, and that he would not rest under such an accusation; that Allison then said to him that it was no time to have a difficulty, but that he would see him, defendant, at another time. The defendant at one time occupied Allison's store house as a grocery merchant, but had sold out at the time the said house was burned. After the burning of the store house, Doctor Allison lost a stable or barn by fire.

Cross examined, the witness said that the conversation above referred to occurred at the "jollification meeting" on the public square in Longview, which was held on Saturday night succeeding the presidential election of 1884. In connection with the statements above set out, the defendant said that he had met Doctor Allison on the streets since that Saturday night, but that Allison did not speak to him. About two months before the homicide, Doctor Allison sent witness word to go to his, Allison's, drug store on a particular evening at four o'clock. When witness reached the drug store, Allison said that he was busy, and asked witness to return at eight o'clock. The witness did so, and from the drug store went with Allison to a room over Crutcher & Harrison's store. They reached that room between nine and ten o'clock. Those present at the meeting were Doctor Allison, George Tabler, William Butt, W. T. Whitelock, John Mattox, John Jennings, W. A. Abey, W. R. Bass and witness. Witness re-

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mained in that room only about ten minutes. The parties wanted witness to subscribe to an obligation to keep secret the proceedings of the body, and to defend the life and property of each member. Witness declined, saying that he would defend a friend's life and property without being oath-bound, but would not defend everybody. The conclave adjourned to meet on the next night, and asked witness to meet with them, but witness declined and did not attend the meeting. Several houses had been recently burned, and a great deal of petty stealing had been going on for some time. Allison's store was burned in January, 1884. The sheriff, the constable and the city marshal of Longview were good and efficient officers, and had efficient deputies.

John Jennings testified, for the State, that an organization to suppress prevailing crime was organized in Longview a short time before the killing of Doctor Allison. The witness was at Allison's house on the night before the homicide. The parties present on that occasion were Doctor Allison, George Tabler, John Mattox, W. T. Whitelock and witness. They adjourned that night to meet at ten o'clock next day at the opera house. The business men of Longview manifested but little interest in the said organization. There were meetings of that body held which the witness did not attend.

J. F. Harrison testified, for the State, that he saw the difficulty which resulted in the killing of Doctor Allison by the defendant. The killing occurred at about seven o'clock in the morning. The witness was on the street railway track, nearly in front of the telephone office, when the shooting occurred. Defendant was very near the witness, riding towards him, when witness first saw him. Doctor Allison rode up behind defendant, and when he got at defendant's side, or, perhaps, slightly ahead of defendant, the defendant extended his hand and fired two shots in quick succession. Allison's horse then turned towards Allison's place of business. Defendant's horse stopped on the street railway track, when both witness and defendant looked at Allison. When Allison fell, defendant turned the pony he was riding and fled, whipping his pony with his hat. Defendant and Allison had passed Allison's burned corner but a short distance when the killing occurred.

On his cross examination the witness testified that when he first observed the defendant the latter was on his pony, standing at or very near the place where the shooting occurred. About that time Allison rode around the burned corner, approached

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defendant from behind, and about the time he reached the defendant both of them started their horses, riding towards the witness. The shooting occurred at once. Witness could not remember what directed his attention to the parties, but he was going towards them, and did not stop until the shooting occurred. At the time that the fatal shots were fired, Allison was looking towards the witness, defendant was looking at Allison, and witness was looking at defendant and Allison. Witness thought his present testimony was the same as that he gave on the habeas corpus trial of the defendant. He would say now that, while it was possible that Allison was looking at the defendant at the time that the shots were fired, it was a very singular look. The horses of both Allison and the defendant were moving in a very slow walk when the shots were fired. The witness could not now describe the position in which Allison held either of his hands at the time of the shooting. Upon reflection the witness was constrained to admit that the shooting first attracted his attention particularly to the parties, but he saw them before the shooting. The shooting occurred about thirty steps north of the telephone office, which was in the second story of the Boring & Kennard building. Had the parties kept on in the direction they were going, they would have crossed the street railroad track, missing the Boring & Kennard building about five feet. They were moving to the right, in the direction that the defendant was traveling. Allison fell from his horse nearly in front of his drug store. That drug store was on the north side of Tyler avenue, and was the house now occupied by Rembert as a dry goods store, as shown on the diagram of Longview now exhibited to witness. Witness did not belong to, nor had he at that time heard of the existence of, a vigilance committee in Longview. Witness owned considerable property in Longview at the time of the killing of Allison.

W. T. Butt testified, for the State, that he witnessed the shooting of Allison by the defendant. The witness's store was that marked "Butt & Tankersly" on the diagram. It was on the same street and on the same side that Allison's drug store was on, about seven store houses intervening. Witness was standing in front of his store, about twenty or thirty steps from the defendant and Allison at the time that the fatal shots were fired. Allison came into the street behind the defendant, and, just as he got to defendant's side, defendant pulled his pistol, hung it down by his side, reined his horse towards Allison, and then

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raised his hand and fired, and then fled. When the witness first saw Allison and defendant they were west of him. They were to the right and east of witness when the killing took place. Allison was riding somewhat faster than defendant. He was looking at defendant, with his head careened towards defendant, when the shots were fired. On his cross examination the witness said that Allison overtook defendant after passing witness. Defendant was riding his pony in a slow walk. Allison was pacing his horse towards his place of business.

Doctor R. B. Hamilton, for the State, described the wounds inflicted upon the body of the deceased, both of which entered from the right side, and one of them perforated the heart. On his cross examination he said that he saw a Smith & Wesson improved pistol, just after the shooting, which was said to have been taken from the body of the deceased after his fall.

The material fact testified to by F. P. Hamill was that just after the removal of the deceased to his room he saw W. P. Stannart remove a pistol from deceased's person. It had been carried on his right side, between the waistband of the pants and the body.

Deputy Sheriff Pleasant Cocke was the next witness for the State. He testified that he saw the killing of Allison by the defendant. When he first saw the parties, just before the shooting, they were coming down the street running east and west, one of the parties, witness did not remember which, riding a little in advance of the other. They turned the corner at Allison's burned store, and went east up Tyler avenue. At that time they appeared to be riding together. They angled to the right and rode in that direction a short distance. Tillery then turned his horse to the left, rode up near to Allison and shot him. It was the recollection of the witness that defendant held his pistol a short space of time after he drew it before shooting. The shooting occurred on the north side of the street railway track, Allison, at the time, being next to the north sidewalk. Witness was immediately behind the parties, between the public well and Mayfield & Luckett's corner, as shown on the diagram. Tyler avenue was about one hundred feet wide. The street railway passed over it about the center. The witness saw no demonstration of any kind on the part of Allison. Witness, however, was looking at Tillery. He had been searching for Tillery all that morning to arrest him on a charge of carrying a pistol. The fatal shots were fired at a point in front of

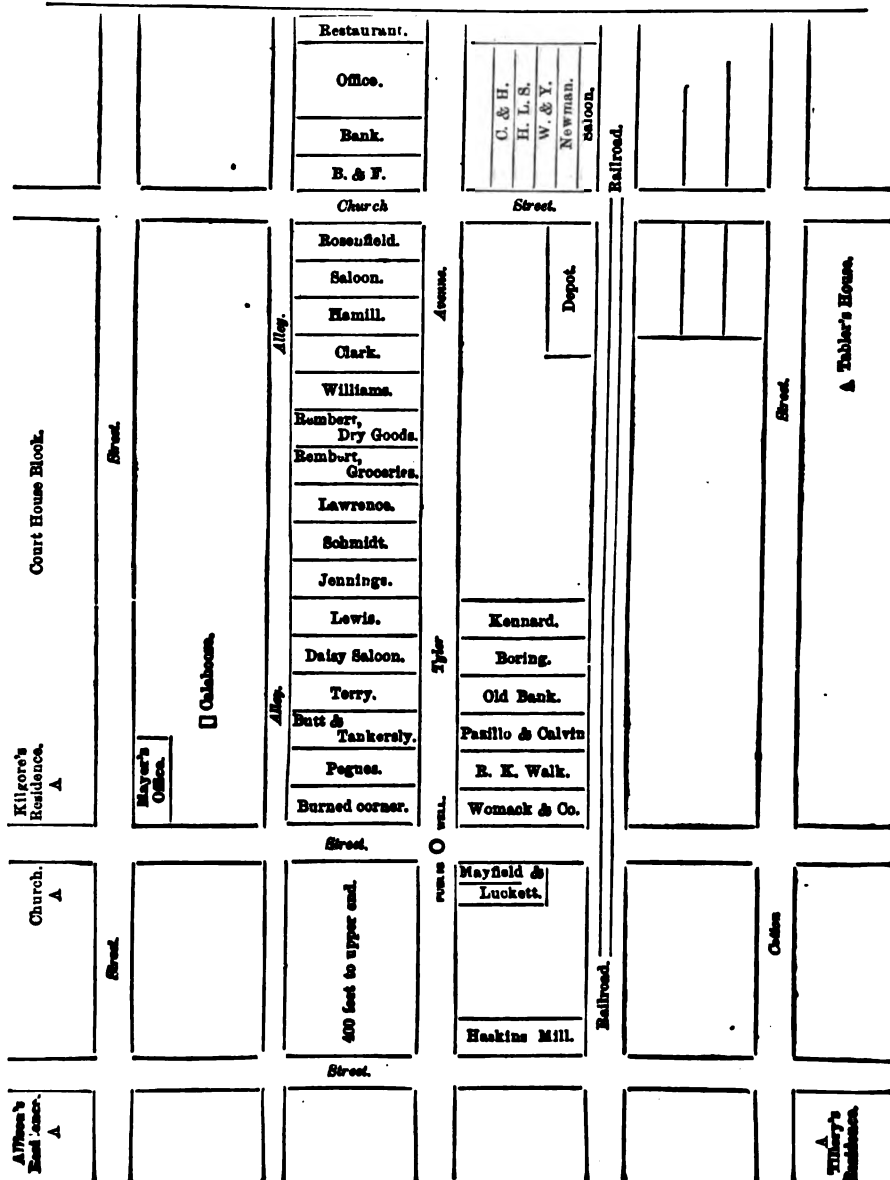
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Jennings & Schmidt's store. The witness mounted Allison's horse and followed defendant, but defendant, having the start, outran witness. At a point about three-quarters of a mile from town the defendant abandoned his horse and fled into the woods. Witness did not again see the defendant until February, 1885.

Cross examined, the witness said that he first saw Allison and defendant coming down the street in front of McCord's residence. One or the other, witness did not know which, was then in advance. Allison turned his face to the defendant soon after they turned into Tyler avenue. The witness could not say what, if any, particular thing, Allison was doing at the moment the shots were fired. Witness did not see that Allison turned his body in the saddle at the moment the shots were fired. The plat of the town of Longview (which follows in this report) was here exhibited to the witness, and was pronounced correct. Judge Kilgore's residence could not be seen from Allison's residence, because of the obstruction to the view caused by the Presbyterian church. Allison's residence and his drug store were about two hundred and fifty yards apart. The witness had been a deputy sheriff since 1883. He never heard of the existence of a vigilance committee in Longview until after the killing of Allison. He did not know who, if anybody, belonged to such committee. After returning from the pursuit of defendant, witness met George Tabler and others on horseback.

The State closed its evidence with the plat of the town of Longview, referred to by this and the previous witnesses, and which follows:

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Charles Leet was the first witness for the defense. He testified that he was employed as clerk in Doctor Allison's drug store, in November, 1884, and was engaged in that store at the time of the killing. Allison came into the drug store, on the fatal morning, a few minutes after the witness opened. He remained but a few minutes, telling witness that he was going out to his farm, and to tell any one who might inquire for him that he would be back by noon. Before leaving, Doctor Allison went to the telephone and called for some one; the witness, paying no attention to the call, could not say who. George Tabler soon came to the drug store, and he and Allison retired through the back door of the drug store and held a short private conversation. Witness did not hear any part of their conversation. Allison came back into the store about five minutes before Tabler did. Allison soon left, but witness did not know in which direction he went. His residence was northwest of the drug store about three hundred yards distant. His farm was west from Longview. He would not pass by his residence in going from the drug store to his farm. Allison and Tabler could not be seen from any of the public streets while they were behind the drug store. Witness did not see the whole of Allison's pistol before he left his drug store, on the fatal morning, but saw the rubber handle of a pistol protruding above the waistband of his pants on the right side. The witness next saw the pistol when Allison's body was taken to his house. Allison was shot within forty-five minutes after he left the drug store. Tabler returned to the drug store after the shooting.

Cross examined, this witness said that, after the shooting of Allison, he discovered a package in the drug store which he did not think was in the store when he opened on that morning. It remained there for a month after the killing. The witness did not know who left the package in the store, nor did he know who took it away. The witness saw Allison, the defendant and another man at the rear of the drug store, on the outside, on election day, in November, 1884. He heard the defendant at that time say that Allison would repent. Allison said nothing in reply that the witness heard, and walked off towards the court house. The witness heard other parties talking after Allison went to the court house, but closed the door without observing who they were. The witness did not see that defendant did anything on that occasion, nor did he then notice defendant's hands.

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On his redirect examination, the witness said that the package referred to by him contained nails. He could not remember whether or not he mentioned the package in his testimony on the habeas corpus trial. He did not observe from Allison's demeanor on election day whether he was in a good or bad humor. Allison [Tillery ?] spoke as though he was in earnest, and not in the best of humor. Allison replied: "All right." He did not say "O. K." Tillery used the word "repent," according to the best of witness's recollection, though the word may have been "regret." Witness did not think that he stated on the habeas corpus trial that the word used by defendant was "regret."

A. A. Killingsworth testified that he was sheriff of Gregg county at the time of the homicide. He heard nothing of a vigilance committee until after the killing of Allison. The defendant came to witness's house in February, 1885, after the indictment for the murder of Allison was returned against him, and voluntarily surrendered to the witness.

Mrs. Fidelia Kilgore testified, for the defense, that she was the wife of County Judge John T. Kilgore, and lived with him at his house in the town of Longview on the day of the homicide. On the morning of that day, before the shooting occurred, the defendant came to Judge Kilgore's house, and spent perhaps thirty minutes in conversation with the judge. Witness did not hear the conversation, but heard the defendant, as he left, tell Judge Kilgore that he would be back on the next morning, to which remark Judge Kilgore replied: "If that piece of business is reached before you get back, I will attend to it for you." The county commissioners court was sitting that week. Allison was killed a few minutes after the defendant left. Judge Kilgore's house occupies the location in Longview indicated on the plat in evidence. When the defendant left he went towards the public well. Judge Kilgore had died since the killing of Allison.

Miss Lillie Kilgore, the daughter of the previous witness and Judge Kilgore, testified, for the defense, that she was present and heard the conversation between her father and defendant on the morning of the fatal day. They talked about the change in a public road desired by the defendant.

John W. Mattox was the next witness for the defense. He testified that he was residing in the town of Longview at the time of the homicide, and was clerking for Brown & Flewellen, who conducted business at that time in the Flanagan building,

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across the railroad from the depot. The witness, at that time, was a member of a secret organization, known to the members as "the vigilance committee," which was organized some months prior to the killing of Allison. About thirty men belonged to that organization at one time or another of its existence. A simple oath to keep secret the proceedings of the meetings was administered to and taken by the members. Bob Brown administered the oath to witness. Doctor Allison joined the organization after the witness did. The witness attended a meeting of the committee at Doctor Allison's residence on the night before the homicide. Allison notified witness twice on that day to attend that night, as important business would be brought before the committee. Witness attended and found Doctor Allison, George Tabler, John Jennings, and W. T. Whitelock at the meeting. When Allison notified the witness to attend the meeting, he said that he had previously called a meeting of the committee, but that nobody but Tabler attended. Witness and Jennings went to the meeting together, arriving between eight and half past eight o'clock. When the meeting was called to order, Doctor Allison reported to the committee that he and defendant had a difficulty on election day; that defendant caught the lapel of his, Allison's, coat, and said to him that he, defendant, had heard that he, Allison, had denounced him, defendant, as unworthy the consideration of a gentleman. Allison then said that Tillery was going to kill him, but he, Allison, was not afraid of any one man. He then produced and flourished a pistol to display his skill in handling that weapon. Some one of the committee then suggested that a meeting of citizens be held at the opera house at ten o'clock on the next morning. Allison objected that the next day would be too late, and he may have said: "Now is the time." Witness did not distinctly remember what terms he used at that time. The witness had no recollection of remarking to Whitelock, as they left that meeting, that Allison was trying to draw the committee into his private difficulties. Witness did not know what the special object of the meeting was that night. Allison and George Tabler were the conspicuous leaders of the meeting that night, but Jennings had a few words to say. Witness did not remember his reason for taking no part. He did not learn that Allison's difficulty with defendant would be brought before the meeting until he reached Allison's house. In his speech Allison said that "something ought to be done to-night; to-morrow may be

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too late." Mr. DeGraffenreid was the first person whom witness told of that meeting. He told DeGraffenreid about six months after the death of Allison. Witness denied any knowledge of the meeting when DeGraffenreid first questioned him about it. DeGraffenreid, however, said that he knew all about it. Witness thereupon exacted a promise from DeGraffenreid not to place him on the witness stand, which promise being given, he told DeGraffenreid all about it. Witness attended but three meetings of the committee. He never heard the Tillery case discussed in the committee but the one time mentioned. The committee was not organized to adjudicate the troubles of Allison and Tillery. Its original purpose was to suppress burglary and petty stealing that was prevalent in town. It never had a meeting after the killing of Allison. The committee operated by notifying suspected parties to leave town. Witness did not know what would have been the consequences to parties notified who disobeyed the notice. George Hanna, Fenner Evans and a negro, all suspected parties, were notified to leave Longview, and they left. After the parties named left town, no more burglaries and thefts were committed. Tillery was never notified to leave.

On his cross examination, the witness stated that his obligation not to divulge the proceedings of the committee kept him from telling of the meeting at Allison's. Good citizens of Longview were members of that committee. Bob Brown, who was a good citizen, was a member. The committee had never proposed to kill anybody. The witness declared that he had told honestly and truthfully all that transpired at the meeting at Allison's house, as he remembered it. The prosecuting counsel at this point propounded the following interrogatory to the witness: "Don't you know that no proposition was made in that meeting to go and kill defendant that night?" The witness replied: "Allison and Tabler were both mighty bitter against the defendant." Allison did not use the word "assassinate" on that night. He did not say that he had been warned that Tillery would kill him. He said that he had met Tillery and his, Tillery's, brother at the back of his drug store on election day. He did not say that Tillery's brother had his hand in his pocket. He did not say that the defendant threatened him. He said that he pulled loose from the defendant and told him that a more public place would suit better for the settlement of the difficulty, and that they would meet some other day. He did not say that he was afraid of being

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assassinated by the defendant. He did say that he was not afraid of any one man, and that he could handle a pistol as deftly as any one man. The witness did not know the state of feeling existing between the defendant and Allison until the meeting at Allison's house. He had never heard of the defendant being charged with the burning of Allison's store. No proposition was made in that meeting to notify Tillery to leave Longview. Tabler was killed in Marshall some time after the killing of Allison.

W. T. Whitelock testified, for the defense, that he was a member of the vigilance committee, organized long before the killing of Doctor Allison. The purpose of that organization was to aid the officers in breaking up burglary and theft. On the day before Allison was killed, George Tabler told witness that there would be an important meeting of the committee that night at Allison's house. Witness had not met with the committee for three months, and attended that night through pure curiosity. When he arrived at Allison's house, only George Tabler and Allison were there. Jennings and Mattox came in later. Allison organized the meeting, and said to the members present: "You have all heard how I was treated on election day by Jim Tillery." Some one present replied: "Yes; and something must be done at once or Doctor Allison will be hurt." The objection was then interposed that there were not a sufficient number of the committee present to do anything. It was then stated by some one that a sufficient number of the committee were not present to do anything. This objection was met by the suggestion that enough of the boys about town could be enlisted, and the proposition was made to "go for Tillery." Witness would say that the express purpose of the proposition was to "protect Allison by 'going for' Tillery and his brother on that night." Witness ridiculed the idea of "us old bearded men sitting here by the fire proposing to get a lot of boys to do our dirty work." By "dirty work" the witness meant the proposition to "go for Tillery." George Tabler made the proposition to "go for Tillery." The proposition was received in silence until the objection was interposed that there were not a sufficient number of members present. But little was said after the witness made the remark about dirty work. It was then decided that a meeting of good citizens of the town would be called at the opera house on the next morning. Some one asked Allison if he was prepared to meet danger. Allison replied that he was, and produced a pistol. Witness and Mattox soon left, leaving Tabler, Jennings and Allison at the

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latter's house. Doctor Allison displayed no excitement on that night, and did not exhibit any fear or uneasiness. The meeting was held in Allison's parlor, with the doors, blinds and windows securely fastened to keep the proceedings from being seen or overheard by anyone. The witness was absolutely certain that the motion to "go for Tillery" was made by either Tabler or Allison.

Continuing his testimony, the witness stated that the oath taken by the members of the vigilance committee was not to divulge the proceedings, or any of the secrets of the body. The organization was effected a considerable time before the killing of Allison. Allison joined it about two months before his death. Tabler was one of the original members. The witness would not have attended the meeting at Allison's had he known that the proposition to "go for Tillery" was going to be submitted. The witness first told the details of the meeting at Allison's to Mr. DeGraffenreid, the defendant's attorney. When DeGraffenreid first spoke to witness about the meeting, witness told him that no such meeting had taken place. When the existence of the vigilance committee was actually made public, it created a sensation. In view of the oath taken by the members, the witness considered the exposure of the committee's existence an outrage. Witness was one of the first persons to join the organization and take the oath. The organization was more than two months old when Doctor Allison joined it. Tabler's hotel was about three hundred yards from the business part of town. The witness attended regular meetings of the committee after the burning of Butt's house, in July or August, 1884. Witness heard Tabler and Allison mention Tillery's name in the meetings in connection with the burning of Allison's store. Allison's unsupported word, and no evidence whatever, was presented to sustain the charge against defendant. Allison insisted that Tillery was a bad man. The defendant had lived in Longview about fourteen years at the time of the homicide, and had then been married about a year. He was then farming, but had been previously engaged in the grocery business with either Killingsworth or Stevens. He sold his interest in the grocery store to Killingsworth, two or three months before Allison's house was burned. Witness did not know when nor how DeGraffenreid first heard of the meeting of the vigilance committee at Allison's house. Witness understood the motion to "go for Tillery" to mean to "wipe him, Tillery, out of existence." Witness with-

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drew from the committee that night, because its objects were being overruled, and Doctor Allison's private quarrels and animosities were being dragged in for adjudication by the committee.

On his cross examination, the witness stated that he could not possibly be the friend of the defendant and Stevens and attend the meetings of that vigilance committee. The witness considered that he was bound to secrecy about the committee from the moment he took the oath. No other motive than curiosity prompted him to attend the meeting at Allison's house. The witness could not recollect that Doctor Allison ever said, at any of the meetings, that he had collected evidence enough to convict the defendant of burning his houses. Witness heard Allison say that he was afraid of being killed, but that he was "not afraid of one of them." The prosecuting counsel asked witness: "Didn't you hear Doctor Allison say that he had proof on which he could indict and convict defendant and Stevens?" The witness answered: "Can't recollect." Question: "Did he say that he had collected and had evidence enough to convict the defendant?" Answer: "Can't recollect. Don't know that he ever, at any meeting, said any such thing. What Doctor Allison said grew out of the burning of his houses."

Continuing, the witness said that he could not distinctly remember that Doctor Allison ever said that he was afraid of assassination, though he thought the word "assassination" was used. The witness did not understand the proposition to "go for Tillery" to mean that Allison and Tabler were to "go for him" on the evidence collected by Allison. The witness quit the committee because he thought it was the business of Allison and his friends to interest themselves in Allison's private grievances, and not his, witness's, business. The vigilance committee was originally organized to aid the officers in breaking up an epidemic of burglary. Allison had a store house and a barn burned. Doctor Allison, at every meeting, appeared to witness to be uneasy. Witness once heard him say that he was not afraid of "them" if "they" would give him a show. Witness did not know whether or not Allison ever had any evidence against defendant for burning his houses. The witness did not think that Allison really believed that defendant burned his houses. Before the suit between Butt and Killingsworth on some rent notes, the defendant and Doctor Allison were on friendly terms.

John Kilgore testified, for the defense, that he was employed

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in the telephone office in Longview at the time of the homicide. A short time before the tragedy Doctor Allison signaled the witness to connect him with Tabler. Witness did so, and waited some time for Allison to ring off. He finally concluded that they had finished their conversation and had forgotten to ring off. He then took up the telephone to ascertain whether or not they were through, and heard Doctor Allison tell Tabler to come down town soon, and that somebody would be hurt. Witness did not hear Tabler's reply, as he put the telephone down immediately on ascertaining that they had not quit talking. Witness soon started home, and was sitting at the market house with Mr. Robinson's little son when the shooting took place. While witness was sitting there the defendant passed him, going from witness's father's house towards town. The telephone office was then over Bevins's store, opposite Jennings's drug store.

The testimony of Tom Turner, as delivered on the habeas corpus trial of the defendant, and reduced to writing was, at this point, read in evidence by the defense. It reads as follows:

"I was in Longview the day Doctor Allison was killed. I live in Gregg county, and have lived there since the first of last January. I saw the killing. I was walking on the sidewalk. Tillery was riding in front of Doctor Allison. Doctor Allison rode up and passed Mr. Tillery, and spoke to him. He pointed back over his shoulder and said: 'Do you see that brick there?' pointing to where there was a burned building on the corner. Tillery said: 'What do you mean?' Allison said: 'I mean that I believe you had a hand in burning my house.' Allison by this time had checked his horse, and Tillery was riding towards him. Tillery said: 'You must retract things you have said.' Doctor Allison turned himself in his saddle, throwing his hand to his belt under his vest, and said: 'I retract! Never!' When he did that, Tillery raised his pistol up and fired. Doctor Allison did not get his pistol out. I only saw the handle of the pistol, and don't know if it was a whole pistol. Tillery fired three shots."

Doctor W. L. Marshall testified, for the defense, that some time after the burning of Allison's store, Allison came to his house, and, in the course of a conversation, asked witness: "What would you do if a person was to burn your house?" Witness replied: "I would take him out and hang him." Allison then said to witness: "Come down and join our club." Witness's wife appeared upon the scene, and the conversation was brought to an abrupt close.

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W. R. Bass testified, for the defense, that he joined the Longview vigilance committee in the summer of 1884. The last meeting he attended was some six weeks before the killing of Allison. He quit the committee because some of the members were in favor of taking the defendant and Stevens out and hanging them. That purpose was resisted by other members. Doctor Allison said that the defendant and Stevens burned him out, but offered no evidence before the committee to sustain the charge. Others besides the witness quit attending the meetings because of the disposition to take up the Allison-Tillery quarrel. Witness was not at the meeting at Allison's house on the night before the homicide. Defendant's reputation for honesty was good.

On his cross examination, the witness testified, that Doctor Allison never told the meeting that he had evidence enough to indict and convict defendant and Stevens for burning his house, but was afraid of losing his life by taking up the prosecution. He simply said that they burned his house, and he wanted the committee to take them out and hang them. Allison said that he was afraid defendant and Stevens would kill him for the manner in which he had pursued him. Allison and Tabler were the only two members of the committee who advocated the hanging of the defendant and Stevens. The other members resisted the purpose. At the time of the burning of Allison's houses, one of them was occupied by Killingsworth, and one by Allison himself. The defendant did not kill George Tabler.

H. D. Booth testified, for the defense, that he was city marshal of Longview at the time of the killing of Doctor Allison. He never heard of the existence of a vigilance committee in that town until after the killing of Doctor Allison. The defendant had always sustained a good reputation in Longview for honesty and fair dealing.

T. M. Campbell testified, for the defense, that, in connection with his business as a lawyer, he was, at the time of the killing and before, acting as an insurance agent in the town of Longview. He carried all of the insurance on Allison's houses and stock. Allison's stock was insured with witness for five thousand dollars, and his store houses for two thousand five hundred dollars. Two store rooms in Allison's building were burned, and Allison was paid by the insurance companies one thousand two hundred dollars on each, making two thousand four hundred dollars. About one thousand one hundred dollars.

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worth of Allison's stock was saved, and the sum of three thousand two hundred and fifty dollars was paid him for losses on stock. Butt's house and household goods, which were also burned, were insured with witness for one thousand three hundred and fifty dollars. The defendant and Stevens sold out their stock of groceries to Killingsworth & Co. (Mrs. Killingsworth being the "Co.") about November 3, 1883. The witness's recollection on this point was correct, because he transferred the insurance of Stevens & Tillery on the stock to H. B. Killingsworth & Co. Witness was familiar with the facts involved in the litigation between Butt and Killingsworth. The suit was based upon rent notes of thirty dollars each per month in advance for the year 1884, for the rent of one of the houses that was burned. The said notes were originally executed by Killingsworth to Doctor Allison, and by him were transferred to Butt. Doctor Allison was, however, the real party plaintiff in the suit, and owned the notes when the suit was filed. The defendant was subpoenaed as a witness in that case for Killingsworth. After investigating the facts in the case, the witness told Butt and Allison that they could not recover on Butt's suit on the notes, as he took the notes advised of the facts and the defense of failure of consideration. Witness then dismissed the suit. On the evening after the suit was dismissed, Doctor Allison came to witness and said that he was satisfied that Newt [Stevens ?] fired his house, and that if he could work a scheme to collect the rent he would do it. Witness, at that interview, told Doctor Allison that Tillery, the defendant, had said that he, Allison, was merely using Butt as a tool in that litigation. Allison then said that he believed the defendant had a part in burning his house, which was the first time witness ever heard defendant's name connected with the house burning. The said suit was dismissed in May, 1884. The loss of the suit made Doctor Allison furiously angry. Allison never mentioned defendant's name to witness in connection with the burning of the houses until after the Butt-Killingsworth suit was dismissed, which was some five months after the fire, during which time witness and Allison prosecuted an investigation into the cause of the fire. Killingsworth carried two thousand dollars insurance on the stock he bought from Stevens & Tillery, and after the fire, collected between seven hundred and fifty dollars and one thousand dollars from the insurance companies on losses. Allison and witness were in constant

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communication, and operated together in their efforts to discover the parties who fired the stores, or the cause of the fire. Witness first heard of the vigilance committee after Allison's death.

W. F. Nelson testified, for the defense, that he met Doctor Allison and John Mattox about seven o'clock on the evening before the killing. They observed the defendant and James Taylor talking together. Some one mentioned the defendant's name, when Doctor Allison said: "Don't mention Tillery's name to me." In the same connection Doctor Allison said that he would "fix" the defendant before morning. Witness saw defendant a short time after that and told him what Doctor Allison had said. Defendant laughed and said: "Doctor Allison has not got nerve enough."

Several witnesses for the defense testified that they knew the defendant's reputation for honesty and fair dealing, and that it was good. Others testified that George Tabler attended the habeas corpus trial of the defendant, but was not introduced as a witness by either party. Tabler, subsequent to the killing of Doctor Allison, killed Jeff Teague, the prosecuting attorney of Gregg county, who was then prosecuting this defendant, and was afterward's killed by Teague's father and brother. Doctor Allison was about fifty years old at the time of his death, was nearly six feet tall, would weigh about one hundred and sixty-five pounds, and was well preserved. The State admitted that, on the day of the homicide, the wife of the defendant was at home, sick in bed, and had a child but one week old.

The defense closed.

Mrs. J. R. Allison, the wife of the deceased, testified, for the State, that soon after the deceased went to town, on the morning of the homicide, he came back home and told the witness that he was going out to his farm, and that he had to go by the drug store to get a package of nails he had left there. He then left home, and within a little while was brought back dead.

The motion for new trial raised the questions discussed in the opinion.

J. M. Duncan, Alex Pope, R. C. De Graffenreid and T. M. Campbell, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

Opinion of the court.

WILLSON, JUDGE. I. There can be no question but that the evidence in this case fairly and fully raises the issue of self defense. It clearly appears that the deceased had, for some time previous to the fatal rencounter, been at enmity with the defendant; had repeatedly, and apparently without reasonable or probable cause, charged the defendant with the crime of arson; had threatened to take the life of the defendant; had actually conspired with one Tabler to take defendant's life, and was acting together with said Tabler at the very time of the homicide, in pursuance with and in furtherance of said conspiracy. He and Tabler also endeavored to induce others to enter into said conspiracy with them, under the guise and protection of an oath bound, secret organization called a "vigilance committee."

On the night before the homicide, at the instance of the deceased and Tabler, a meeting of this "vigilance committee" was held at the residence of deceased, at which it was proposed and urged by deceased that the committee should proceed at once, on that very night, to execute the defendant, but none of the committee present would agree to this proposition except Tabler. Early on the next morning, just before the homicide, deceased went to his place of business, and through the telephone summoned Tabler to his presence. Tabler responded promptly, and the two had a private conference. Very soon after this conference the deceased, mounted upon his horse, and armed with a six shooter, rode up by the side of defendant, who was riding along a street in the town of Longview, and, after accosting him, again accused him of the crime of arson, and it was here that he received the fatal shot at the hands of the defendant.

We do not think it can be doubted, from the evidence before us, that the deceased and Tabler had resolved upon taking the life of the defendant at the first favorable opportunity; that they were prepared for and seeking such opportunity; and that, on the occasion of the homicide, the deceased provoked the difficulty which resulted in his death, with the intention at the time of killing the defendant. By the evidence we are fully informed of the condition of the mind of deceased towards the defendant, and as to his intentions and design to wreak vengeance upon him in a deadly manner. He is surrounded by a halo of light, discovering his malice and inward intention, and illustrating his acts.

How stands the case with the defendant? His presence in

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town in the early morning is satisfactorily accounted for; he was there on a matter of business with the county judge. At home he left a sick wife with an infant only one week old. He has attended to his business with the county judge, and, mounted upon an inferior pony, is traveling along a public street. On the night previous he had been informed that the deceased had threatened on that very night to "fix" him before the next morning. He was well aware of the bitter enmity of the deceased towards him, although he may not have known of the conspiracy between deceased and Tabler to take his life. He was armed with a pistol, and, in view of the threat which had been communicated to him the night previous, it can not be said that the fact of his being thus armed indicated anything more than that, should occasion require, he would defend himself against the threatened danger. There is nothing whatever in the evidence to indicate that he was seeking a difficulty with the deceased. Under these circumstances, the deceased rode up from behind, beside the defendant, and, accosting him, accused him again of the crime of arson. Defendant responded that he must retract the charge. Just then, one witness testifies, the deceased, who had ridden a little in advance of the defendant, turned in his saddle towards defendant, and placed his right hand to his right side as if to draw a pistol, when the defendant fired and shot him. A pistol was found on the body of deceased, on his right side, about where the witness saw him place his right hand. Upon this evidence the trial judge very properly submitted to the jury the issue of self defense.

It is earnestly contended, however, by counsel for the defendant, that the charge upon said issue is imperfect, erroneous and prejudicial to the defendant, and should have been supplied and corrected by special instructions requested by the defendant. Considering the charge on self defense with reference to the evidence bearing upon that issue, we are of the opinion that the objections urged to it are substantial and tenable. There is not a particle of evidence fairly raising the issue that defendant had forfeited the right of self defense by seeking and provoking the difficulty, and it was erroneous and prejudicial to the defendant to submit that issue to a jury.

In instructing the jury upon the law of *apparent* danger, the charge makes the right of self defense hinge upon the fact as to whether or not the defendant *honestly* believed at the time he acted that he was in danger of losing his life, etc. This idea of

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honest belief on his part is presented three several times in the charge upon self defense; and, while being subject to the objection that it is made too prominent to the minds of the jury, is besides not a correct statement of the law. The correct rule is that, if it *reasonably* appeared to the defendant, from his standpoint, from the circumstances of the case, that the danger existed, and he acted under the reasonable belief that it did exist, he was justified in defending against it to the same extent and under the same rules permitted in case the danger had been real. (Willson's Texas Crim. Laws, sec. 978.) While it may be abstractly correct to require that the defendant's belief of the existence of danger should be an *honest* one, it is going too far, we think, to so instruct the jury, especially when such instruction is repeated so often, and especially, too, in view of the evidence in this case.

Another serious objection to the charge is that, in instructing the jury in relation to threats made by the deceased against the defendant, this portion of the charge is disconnected from that portion relating to self defense, when it formed a part of the law of the issue of self defense, and should have been given in immediate connection therewith. In the position in which the instruction as to threats appears in the charge, the jury might reasonably have concluded that it had no connection with the issue of self defense, and the effect may have been that, in considering that issue, the jury entirely ignored the legitimate bearing of the threats thereon. The law of self defense, when invoked by the proof, should be given to the jury plainly, directly, connectedly and affirmatively, and in such manner as to show its applicability to the facts in evidence.

In this case, the facts in proof upon the issue of self defense are not complicated, and a plain, direct, affirmative explanation of the law applicable thereto should have been given. We do not think the court gave such a charge, and the failure to do so was, we think, calculated to, and probably did, injuriously affect the defendant's rights. Defendant's guilt or innocence hinged solely upon self defense, and it was all important to him and to justice that the law in relation to that issue should be fully and clearly explained to the jury. The learned trial judge evidently desired and intended to perform this duty, but, as we have attempted to show, in material particulars failed to give the defendant the full benefit of self defense, and such failure, in view

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of the evidence in this case constitutes error for which the judgment must be reversed.

II. Whilst, in our opinion, it was competent for the defendant to prove, if he could, that the deceased had no probable cause for charging him with the crime of arson, and that deceased did not in fact believe said charge to be true, but that the cause of deceased's enmity towards him was an entirely different matter than the arson, still, we do not think the court erred in refusing to permit the witness Campbell to answer the question propounded to him, as to whether, in an investigation he had made about the arson, he had found any evidence tending to connect the defendant with it. The objection made to the question was that the answer thereto would be but the conclusion of the witness. This objection, we think, was properly sustained. If the witness had been called upon to state facts within his knowledge concerning the arson, and the defendant's relation to those facts, such testimony would have been relevant and admissible in view of the other evidence in the case.

III. It was not error to reject the proposed testimony of the declarations of Tabler. Said declarations were made some time after the homicide, and were not a part of the *res gestæ* of the homicide. They were hearsay. The fact that Tabler was a co-conspirator with the deceased in seeking to take the life of the defendant would not render such declarations admissible in behalf of the defendant. If the deceased or Tabler had been on trial for a crime committed in furtherance of such conspiracy, then the declarations of one, made pending such conspiracy and in furtherance thereof, would be admissible against the other. (Willson's Texas Crim. Laws, sec. 1048.) But we know of no rule of law which would render admissible in behalf of the defendant the declarations of Tabler, made after the commission of the homicide.

IV. In his closing argument to the jury, counsel for the State went out of the record, in speaking of Tabler, to tell the jury about the circumstances of Tabler's death—the manner in which, by whom and for what cause said Tabler had been killed, and why it was, and how it was that Tabler had killed one Teague, and several other matters in relation to said Tabler, about which there was no evidence. Counsel for defendant promptly objected to these remarks, and the court overruled the objection, appending to the bill of exceptions his reasons for so doing, which are that defendant's counsel had, in their address to the jury, severely

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denounced, as a coconspirator with the deceased, the said Tabler, etc. As shown by the evidence in the case, counsel for the defendant were justified in so denouncing said Tabler, and in so doing were but reproducing the evidence adduced on the trial. Counsel for the State was not, therefore, warranted, in reply to this legitimate denunciation, in stating to the jury his individual knowledge of Tabler, and recounting to them the circumstances of the killing of Teague by Tabler, and the subsequent killing of Tabler by the father and brother of the deceased Teague. These matters were wholly foreign to the case on trial, without any support whatever in the evidence, and were calculated to operate upon the minds of the jury prejudicially to the defendant. These improper remarks, if there was no other error apparent in this record, would justify, if not demand, a reversal of the judgment.

V. A number of other errors are assigned, which we shall not discuss or determine, as they are of that character which are not likely to occur on another trial. Because of the errors in the charge, and the improper remarks to the jury made by counsel for the State, above mentioned, the judgment is reversed and the case is remanded.

Reversed and remanded.

Opinion delivered November 12, 1887.

No. 2481.

J. W. BROOKS v. THE STATE.

1. **MURDER—MANSLAUGHTER—SELF DEFENSE—CHARGE OF THE COURT.**—See the opinion and the statement of the case for evidence on a murder trial *held* not to raise the issue either of manslaughter or of self defense; wherefore the trial court properly refused to instruct the jury upon those questions.
2. **CONTINUANCE.**—The ruling of the trial court refusing a continuance will not be revised by this court unless, in addition to its other requisites, the application shows the relevancy and materiality of the absent testimony.
3. **SAME—PRACTICE—THREATS.**—Proof of deadly threats made by the deceased against the accused, and that the deceased was a violent and dangerous character, and that the threats and the character of the deceased

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were known to the accused at the time of the homicide, can afford no justification for homicide without proof that, at the time of the homicide, the deceased did some act indicating a present intention to kill the accused or do him serious bodily harm. Neither the evidence adduced on the trial nor that foreshadowed in the application for continuance laid a predicate for proof of threats in this case; wherefore a continuance was properly refused.

APPEAL from the District Court of Navarro. Tried below before the Hon. Sam R. Frost.

The conviction in this case was in the second degree for the murder of E. H. Moses, and the penalty assessed against the appellant was a term of fifty-five years in the penitentiary.

A. N. Stewart was the first witness for the State. He testified that he formed the acquaintance of the defendant and the deceased at the same time, about Christmas, 1886. The witness and deceased, returning from a fishing excursion, reached the witness's house about eleven o'clock on the morning of April 7, 1887. Witness's brother hitched up his wagon to go to his mother-in-law's, and witness and deceased went with him as far as the deceased's house, when they, witness and deceased, stopped. Deceased remarked that he would get a drink of water and then take a look at his corn. Witness and deceased then went through the house to the well, and back through the house to the garden, and thence to the barn to see if deceased's efforts to poison rats had succeeded. About the time that witness and deceased reached the barn, the defendant came to the house from his field, where he had been planting cotton. Witness and deceased then went back to the house. Passing defendant at the well, witness addressed him, "Howd'y do?" Defendant returned the salutation in a somewhat sulky tone of voice. Deceased passed on to the kitchen door, where he sat down on the step. Just as defendant turned as though to go back to his work in the field, the deceased said to him: "Jo., I suppose you want to hire a hand to work out my part of the crop." Defendant turned and walked back to a point about five feet distant from deceased and replied: "Eg., I did say it." Deceased then said: "I want you to distinctly understand that I am running my part of the crop." A violent quarrel then ensued, the deceased cursing the defendant, and the defendant cursing back. One word brought on another, and finally the collision. Witness did not see the first blow struck. He had looked away, but heard the sound of a

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blow. He then looked back and saw that a gash had been cut in deceased's jaw, and that defendant had a knife in his hand. Witness saw no weapon in the hands of the deceased. Defendant had the knife in his hand when he approached deceased from the well. The two parties being clinched, the deceased called to witness to pull the defendant off him, as defendant was cutting him to pieces. Witness rushed toward the parties, when defendant made a blow at him with the knife. The deceased finally broke from the defendant's embrace and fled, running in a circle through the orchard, pursued by the defendant. The witness followed defendant, who turned his head and told witness that if he ran up on him, that he would cut witness. The deceased stumbled once in flight, but recovered himself and ran into the house, followed by defendant, until he sank down near the door.

The witness did not think that deceased appeared angry, or spoke angrily when he addressed the defendant about hiring a hand to work the crop, but he became angry as the quarrel progressed. When he walked up to deceased from the well, the defendant appeared to be half crying, and was jerking all over. He said to deceased: "Eg, I did say it; you ought to stay at home and work your crop." Witness was not looking at the parties when the first blow was struck, but heard the blow and turned immediately and discovered the gash on deceased's jaw. The witness could not tell how the cutting was done. The defendant held deceased clasped so closely in his embrace that witness could not detect the movements of his hands. He held deceased at least a minute and a half before deceased escaped, and in that time could have cut him several times. The only time witness heard deceased halloo was when he called to witness to take the defendant off. The defendant did not cut deceased after the latter got loose from him. Of that fact the witness was absolutely certain. He was not near enough deceased during the latter's flight, except when the latter stumbled, and he did not cut then. Witness left immediately after the cutting and before the deceased died. He saw the defendant's knife. It had two small blades in one end and a large blade in the other end. Witness plainly saw the deceased bleeding at the jugular vein on the left side of the neck. The blood was spouting out in a torrent. He afterwards saw wounds on the deceased's neck, jaw, arm, side and breast. The wounds in the side and breast were stabs. Deceased had just got up from the puncheon at the

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kitchen door when he and defendant clinched. Defendant was the taller of the two men, but did not weigh as much as the deceased by twenty pounds. The homicide occurred in Navarro county, on the seventh day of April, 1887.

On his cross examination, the witness said that he and deceased went fishing on the day before the homicide. Witness was on his way to Farmer's house when he stopped with the deceased at his, the deceased's, house. Defendant and deceased did not speak to each other when the latter and witness first met him at the well. Witness did not understand the words uttered by either party during the quarrel, except that a great many of them were oaths. Witness was very much excited. The parties were clinched and the deceased was bleeding from cuts on the neck and jaw when witness, having looked from them, looked back after the sound of the first blow. Witness did not know which of the parties struck the first blow, nor did he know which of the blades of the knife was used by defendant. Witness was standing about ten feet from the parties when the fighting commenced. Witness did not hear deceased, during the fishing excursion, say anything about a probable row between himself and defendant or anybody else. Witness had, on occasions previous to the fatal day, heard defendant and deceased address each other roughly, but never thought that they meant what they said. In his flight after the cutting, the deceased led the defendant about eight feet. Deceased kept dodging around defendant as he ran. The deceased spent some time at witness's house on the day before he and witness went fishing. Some one then at witness's house said to deceased: "You and Jo. come and go with us fishing." Deceased replied: "He can do as he pleases." A boy at the witness's house on that day told deceased that he heard defendant say that he would hire a hand to work in the place of the deceased. Deceased appeared to be angered by this information, and when he spoke to defendant about it he spoke angrily. Deceased went to Hubbard's house a few days before the fishing excursion, remaining there a day or two. Witness thought that deceased's wife stayed at Cox's until deceased returned from fishing. Witness had no recollection of seeing Mrs. Moses during the row until the deceased ran into the house. Deceased once told the witness that the defendant, when angry, would cry. Witness never saw the defendant cry except on the occasion of that fight. After cutting the deceased, the defendant went for the doctor. Witness next saw the defendant on the next day at

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Justice Carroll's office, about half a mile from the place of the killing. Immediately after the cutting, witness went off to send some of the women to Mrs. Moses. Thence he went to his home at his uncle's house, about a mile from the place of the killing. The fight occurred about two o'clock in the afternoon.

On his redirect examination, the witness said that the defendant, at Justice Carroll's office, gave him the knife with which he cut the deceased, and the witness gave it to Justice Carroll at the inquest.

— Ramsdell testified, for the State, that while he was at work in his field, on the seventh day of April, 1886, he heard a woman's voice at deceased's house crying: "He's dead! He's dead!" The witness went immediately to the house, and found deceased lying on a pallet. He was not yet dead, but was speechless. Witness saw and examined only the wounds on the jaw and the left side of the neck.

Doctor Buckalew testified, for the State, that he did not reach Moses until after his death. He then examined the wounds, two of which he pronounced necessarily mortal.

A. V. Cox was the next witness for the State. He testified that he was one of the parties in the fishing excursion, testified to by the witness Stewart. He left the party at Blooming Grove, on the day of the killing, and went home, lay down on his bed and went to sleep. He was awakened after sleeping some time, and informed that Stewart had reached the house and had reported the cutting of Moses. Witness then went to Moses's house, reaching it but a few moments before Moses died. Some time prior to the fatal difficulty, the defendant came to witness to borrow a pistol, explaining that Thompson was after him for aiding in the elopement of his daughter and the deceased. Witness had just before observed the defendant and the deceased when they parted, going in different directions, after an apparently earnest conversation. He refused to lend the pistol to the defendant, and the defendant replied that he knew where the witness kept his pistol, and would go to witness's house and get it, explaining to witness's wife that he had conditionally purchased it. Witness replied that his wife was too well posted to be imposed upon in that way, and that furthermore he (witness) would follow him to the house. Defendant several times tried to borrow witness's pistol, always assigning his trouble with Thompson as his motive, except on the last effort he made, when he said that he and Thompson had become reconciled. On the

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last evening he tried to borrow the pistol, the defendant remarked: "I may finish this crop, but if things don't change I won't." Witness told him that in that event he would have to work to make a living, and he replied: "I will put myself in a fix that I won't have to work." He did not explain what he meant. He several times told witness that Moses had had his own way, and had done all the blowing and cursing; but that the longest lane had a turn, and things would have to change. Witness heard Moses, on the fishing excursion, speak jokingly of defendant's names for different parts of a complicated high pressure steam engine, and about defendant's claim of being a machinist. At the time of the killing, Moses and the defendant had dissolved their partnership as to the house they jointly occupied, but not as to the crop.

The original cause of the falling out between the defendant and the deceased was a disagreement between defendant and the deceased's wife. Something was said to deceased on the fishing excursion about the quarrel between his wife and defendant, and witness asked deceased why he did not take up his wife's quarrel. Deceased replied that defendant only made out like he wanted to fight, and that he had told defendant that when he wanted a fight he could get it. Witness once heard the deceased and defendant quarreling about some chickens, during the course of which quarrel the deceased did some violent cursing, and told defendant that he could whip him quicker than hell could scorch a feather. On another occasion witness heard deceased speak roughly to defendant about whittling in the house. He called defendant a d—d fool, and required defendant to sweep up the litter he had made. On one occasion the defendant told witness that he anticipated trouble with deceased when they came to settle their accounts; that he had kept an account of the time deceased had not worked, and that deceased had kept no such account.

Justice of the Peace Carroll was the next witness for the State. He testified that about four o'clock in the afternoon of April 7, 1886, the defendant surrendered to him, explaining that he had probably killed E. H. Moses. Witness had heard of the killing, and was then on his way to the scene. The inquest was held about sun set. Just before the inquest Joe Stewart gave witness the knife with which it was said the cutting was done. The knife had a large blade, about three and a half or four inches long, and had two small blades.

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Dock Faglea testified, for the State, that both the defendant and deceased had talked to him about frivolous disagreements to which the witness attached no importance, and which he always advised them to drop. The defendant appeared to feel that he had done a great deal for the deceased and his wife, and that they did not appreciate his services or treat him as he ought to be treated by them. He did not appear to approve of the deceased going off fishing, and leaving him to work the crop, though he said that deceased had authorized him to charge lost time against him at a stipulated price. About a month before the killing the deceased caught one of two chickens, then fighting, and threw it on the defendant's bed. The defendant told deceased that he was inclined to take his bed into the room occupied by deceased and his wife. Deceased replied that such a proceeding would produce a pair of black eyes. Defendant complained of that episode to witness.

Mrs. E. H. Moses, the widow of the deceased, testified, for the State, that she was sitting inside of the door, and her husband on the steps on the outside, when the fatal quarrel began. She heard her husband say to the defendant: "I heard you were going to hire a man to work the crop. You can hire Joe Stewart and Dolly and I will go fishing every day." Witness did not see the first cutting. Deceased fled into the house, pursued by the defendant, and after he fell to the floor the defendant cut him the last time. Deceased never spoke after he fell. Defendant came to Cox's house, where witness was staying, on the night before the killing. He borrowed a whetstone from Mrs. Cox, and after sharpening his knife, he said: "I don't expect to work any more after to-morrow." About a month before the killing, the defendant conceived the idea that witness and a young girl visitor were talking about him, and said to witness: "This will cause you many thousands of bitter tears." Witness and deceased were married on the twenty-second day of December, 1886.

On her cross examination, the witness said that both deceased and Stewart were sitting on the door step when the row first commenced. The defendant, after getting a drink of water, sat down on a box near the deceased. After making the remark quoted by the witness on her direct examination, the deceased said to the defendant: "The days that you lose you pay for, and the days that I lose I will pay for." Within a few moments witness saw Stewart run across the doorway, and she knew instantly

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that something was wrong. Witness then stepped to the door and saw the deceased running and the defendant following him, but she did not know that defendant then cut the deceased. When the deceased started fishing on the day before, he asked defendant if he wanted to go, and proposed to stay at home and work if defendant would go. Defendant replied: "No, by God; I am going to stay at home and work." The witness knew of but one previous quarrel between defendant and deceased, and that occurred upon the defendant's threat to move his bed into the room occupied by witness and deceased. The witness had known the defendant about six years, during which time, until the quarrel spoken of, he and deceased were on friendly terms. Defendant was working for witness's father until witness's marriage, which her father opposed because of her youth. The defendant aided witness and deceased in eluding the vigilance of witness's father and in getting married. His part in that transaction enraged witness's father, and he discharged the defendant. Defendant and deceased then formed a co-partnership, and went to "cropping" together. Defendant's threat to move his bed into witness's room outraged her feelings, and she told the defendant that she had no further use for him. That angered the defendant and he refused to permit the witness to cook for him any longer, remarking that he would not allow any one to cook for him who cared nothing for him. On that occasion the defendant and the deceased cursed each other.

The State closed.

Sam Stewart testified, for the defense, that he was one of the parties who went fishing on the day of the homicide. While on that excursion the witness heard the deceased ridiculing defendant for calling different parts of a steam engine by improper names. In that same connection deceased said that he was going to have a row with defendant as soon as he got home, because defendant had threatened to hire a hand in his place. Witness attempted to dissuade him from his avowed purpose to provoke a difficulty with defendant, but deceased would not be dissuaded. He said that he was not afraid of defendant; that he could whip defendant before he could turn around, and that he was going to force a row as soon as he got home. This conversation occurred on the day of the killing, just before the fishing party started home.

Cross examined, the witness said that he was the brother of the State's witness, A. N. Stewart. The words of the deceased

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were as follows: "When I get home I am going to give Brooks to understand that I am partly boss on that hill. I am going to curse him and raise a row with him." Deceased did not say that he was going to hurt defendant in any particular way. When the fishing party, on their return home from fishing, passed the field of deceased and defendant, witness saw defendant down in the field, planting cotton.

Bud Griffin testified, for the defense, that he was at work in the field, a half mile from the scene, when the cutting occurred. He knew nothing about the particulars of the fatal difficulty. Just after the cutting, witness went after Mr. Thompson, the father of Mrs. Moses.

The important portion of the testimony of the defendant's witness, George Leftwich, was to the effect that, some time before the killing, the deceased told witness that he and defendant were not getting along well together. He often told witness that defendant was a coward, and that he had made defendant cry many times.

Mr. Spriggs testified, for the defense, that the deceased worked for him in March or April, 1886. At that time defendant and deceased were on exceedingly intimate terms. The deceased told witness that defendant was going to help him get a wife, and that defendant had some means, and was going to crop with him.

Mr. Thompson testified, for the defense, that the defendant lived and worked with witness three years in Alabama; then came to Texas with witness, and worked one year with him. Shortly after his arrival in Texas, the defendant contracted a severe case of the "Texas big head;" helped deceased elope with witness's daughter, and witness discharged him. Witness was opposed to his daughter's marriage on account of her youth. Defendant was a good work hand.

W. C. Pauley testified, for the defense, that in the course of a conversation with deceased, some time before the homicide, deceased said that he and defendant were partners in the crop, but were not getting along well. Witness asked him why he did not either buy or sell out to defendant. Deceased replied that he would work on a while longer and get all of defendant's share for nothing. On his cross examination, the witness said that he was never introduced to the deceased, and never saw him but twice before the meeting at which this conversation occurred.

The defense closed.

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Mr. Faglea, recalled by the State, testified that, when he heard the hallooming at deceased's house, he left his work in his field and started to the said house. En route he met defendant riding his, witness's, horse. He asked the defendant what the trouble at the house was. Defendant replied that he had cut deceased and was going for a doctor. Witness took his horse from defendant and sent his son for the doctor. Defendant remained at witness's house about thirty minutes after witness got back from deceased's house. He asked witness's advice about what to do. Witness advised him to go to 'Squire Carroll and surrender. Defendant then went off, declaring his purpose to surrender to Carroll.

Scott & Ballew, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. I. As the evidence in this case impresses itself upon our minds, it does not raise the issues of manslaughter and self defense, or either of said issues, and therefore the court did not err in refusing to instruct the jury upon the law of such issues. The only eye witness to the homicide states that the deceased and the defendant were standing some five feet apart, deceased unarmed, defendant with a knife in his hand. They were quarreling. Witness looked in another direction and did not see the first lick struck. He heard a blow, however, and immediately looked toward the parties and saw a gash in deceased's jaw. Deceased then called to witness and said: "Pull him off; he is cutting me all to pieces." Witness rushed up to the parties, and defendant with his knife struck at witness. Deceased finally broke loose from defendant and ran fifty or sixty yards, around in a circle, and into the house, where he sank down and died. Defendant ran after deceased, attempting to again cut him, and did again cut him after deceased had sank down in the house. Witness ran after the defendant as defendant was chasing the deceased, and called out to defendant to quit and let deceased alone. Defendant turned his head and told witness if he, witness, came on to him he would cut him. These are the uncontradicted facts as developed by the record. Giving to the entire evidence the most favorable consideration for the defendant, the homicide could not be of a lower grade than murder in the second degree, and excludes the theory of self defense.

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II. There was no error in refusing defendant's application for a continuance. Conceding that sufficient diligence had been used to obtain the alleged absent testimony, it does not appear from the application that the said alleged testimony was material. Proof of threats made by deceased to take defendant's life, and that deceased was a man of violent and dangerous character, and that defendant had knowledge at the time of the homicide of such threats and character of deceased, would be immaterial, unless it was shown that at the time of the homicide the deceased did some act indicating his purpose then to take the life of the defendant, or do him serious bodily harm. (Wilson's Texas Crim. Laws, secs. 1052, 1053, 1054.) The application for continuance does not show the materiality of the testimony as to threats and the character of the deceased by alleging that deceased, at the time of the homicide, did any act indicating a purpose to injure the defendant. Nor does the evidence adduced on the trial show any such act on the part of the deceased, and if said absent testimony had been adduced on the trial, it would have been irrelevant and immaterial, and could not have afforded the defendant any justification.

III. There was no error in overruling the defendant's motion for a new trial. The attempt made to show misconduct on the part of the jury was fully met and successfully answered by the State.

We have found no error in the conviction, and the judgment is affirmed.

Affirmed.

Opinion delivered November 12, 1887.

No. 2483.

S. A. MELTON v. THE STATE.

1. **ASSAULT WITH INTENT TO RAPE.—ATTEMPT TO RAPE**, as that offense is defined by article 535 of the Penal Code, is an offense distinct from rape or assault with intent to rape, and comprehends elements different from those which combine to constitute either of those offenses.
2. **SAME—PRACTICE**.—The indictment in this case charged, in the first count, an assault with intent to commit rape, and in the second count an at-

24	284
26	231
24	284
34	210

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tempt to commit rape. The State elected to prosecute upon the second count, and the conviction was had under that count. One of the grounds relied upon in the motion to quash the second count was that there can be no conviction for attempt to rape except on a trial for the specific offense of rape. *Held* that the motion to quash was properly overruled, an attempt to rape being a substantive offense for which an indictment may be found and a conviction had.

3. **ATTEMPT TO RAPE—FACT CASE.**—See the statement of the case in *Melton v. The State*, 23 Texas Court of Appeals, 204, for evidence *held* sufficient to support a conviction for attempt to rape.

APPEAL from the District Court of Navarro. Tried below before the Hon. Sam. R. Frost.

The conviction in this case was for an attempt to rape one Allie J. McIntyre, and the penalty assessed was a term of four years in the penitentiary.

The transaction upon which this prosecution was predicated is the same upon which the appellant was previously prosecuted to conviction under an indictment charging him with an assault with intent to rape the said Allie J. McIntyre, and which conviction was reversed by this court at its Galveston term, 1887, upon the ground that the evidence on the trial would not support the conviction for the offense charged. That case will be found fully reported in the twenty-third volume of these Reports, commencing on page 204. The evidence adduced upon that trial, and set out at length in the report of the same, is identically the same evidence adduced upon this trial from the same witnesses.

Read, Greer & Greer, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. The indictment in this case charges an assault with intent to rape, in the first count, and an attempt to rape in the second.

After the evidence was in, the district attorney elected to prosecute upon the second count alone. Appellant had moved to quash this count, upon the grounds: 1, because there is no such offense known to the laws of this State as attempt to rape; 2, because there can be no conviction for an attempt to rape, except on a trial for the offense of rape; 3, because it is not a different mode of alleging the same offense that it alleges a breach of a different statute.

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Article 535 of the Penal Code provides that, "if it appears on the trial of an indictment for rape that the offense, though not committed, was attempted by the use of any of the means spoken of in articles 529, 530 and 531, but not such as to bring the offense within the definition of an assault with intent to commit rape, the jury may find the defendant guilty of an attempt to commit the offense, and affix the punishment prescribed in article 513"—that is to say, the same as for an assault with intent to commit rape.

It is conceded by appellant that, if the accused were on trial for the substantive offense—rape—and the evidence fails to establish rape, or an assault to rape, he might be legally convicted of the attempt. If this be so, there is evidently a distinct offense known as an "attempt to commit rape," with elements different from rape or assault to rape. There being such an offense, the grand jury are not required to indict for rape, thus presenting a falsehood in order to charge the lesser offense, but may and, where there is no rape or assault to rape, should indict for the attempt to rape—the offense indicated by the evidence. That this offense has elements which do not constitute a technical assault is clearly demonstrated in a number of cases decided by this court. (*Williams v. The State*, 1 Texas Ct. App., 90; *Burney v. The State*, 21 Texas Ct. App., 565; *Moore v. The State*, 20 Texas Ct. App., 275; *Melton v. The State*, 23 Texas Ct. App., 204; *Taylor v. The State*, 22 Texas Ct. App., 529.)

If the accused can legally be convicted of the offense of an attempt to commit rape under an indictment for the substantive offense, we can not perceive upon what ground he can complain of a conviction for the attempt under an indictment which distinctly charges the acts constituting the crime for the commission of which he is sought to be punished.

We are of opinion that the court did not err in refusing to quash the second count in the indictment; in other words, it is correct and legitimate practice, where the facts warrant it, to indict directly for the attempt, just as in a case for an assault with intent to rape, there being no evidence tending to establish rape.

As the facts in this record are the same as presented on the former appeal, and as this court held that they did not support the verdict, and the judgment was reversed, counsel for appellant insist that this judgment should, for the same reason, be reversed. Looking to the record on the first appeal, counsel's

Syllabus.

conclusion by no means follows. The first trial was had upon an indictment charging an assault with intent to commit rape by means of force alone. We held that this allegation was not supported by the proof, and that the evidence presented a case in which the means used was fraud and not force. When the mandate went down, the district attorney procured another indictment, the second count of which—that upon which appellant was convicted—alleges an attempt to commit rape by threats and fraud, thus covering the defect in the first indictment and making it conform to the actual facts of the case.

It is expressly stated in the opinion of Judge Willson that the evidence then before us was amply sufficient to sustain a conviction for the offense of an attempt to commit rape by means of fraud. (*Melton v. The State*, 23 Texas Ct. App., 204.) We think so still, and, finding no error, the judgment must be affirmed.

Affirmed.

Opinion delivered November 12, 1887.

No. 2482.

S. A. MELTON v. THE STATE.

1. **BURGLARY—INDICTMENT—EVIDENCE—CHARGE OF THE COURT.**—To constitute a nocturnal burglary, under the statutes of this State, the house must have been entered by force, threats or fraud. The indictment in this case charges that the defendant “did by force, in the night time, break and enter the house,” etc. *Held*, that, to authorize a conviction, under this indictment, it devolved upon the State to prove beyond a reasonable doubt that the accused entered the house by applying actual “force” to the building. In failing to so charge the jury, and in refusing to give a special instruction in substantial compliance with the rule announced, the trial court erred.
2. **SAME—EVIDENCE.**—There was not only a total absence of evidence on this trial tending to show an entry by breaking or by force, as alleged in the indictment, but the proof was positive that the entry was made through an open door. *Held* insufficient to support the conviction for burglary.

APPEAL from the District Court of Navarro Tried below before the Hon. Sam. R. Frost.

Opinion of the court.

The conviction in this case was for the offense of burglary with intent to rape one Allie J. McIntyre, and the penalty assessed against the appellant was a term of five years in the penitentiary.

Commencing on page 204 of the twenty-third volume of the Reports, will be found the report of the case of *S. A. Melton v. The State*, the conviction in that case being for an assault with intent to rape Allie J. McIntyre, the same party described in the indictment in this case. The transaction involved in that case, and the transaction involved in the case of *S. A. Melton v. The State*, for an attempt to rape, which immediately precedes this case in this volume, and the transaction involved in this case are all one and the same transaction, and the convictions in each of the cases are predicated upon the same identical testimony of the same witnesses; which is set out fully in the report above referred to.

Read, Greer & Greer, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. It was charged by the indictment in this case that defendant did "by force in the night time break and enter a house then and there owned and occupied by Johnson McIntyre, without the consent of said Johnson McIntyre, and with the intent then and there, by force, threats and fraud, to have carnal knowledge of one Allie J. McIntyre, then and there being in said house, without her consent," etc. This is a companion case to the one just affirmed against the same party for an attempt to commit rape in the same transaction.

To constitute a nocturnal burglary under our statute, the house must have been entered by force, threats or fraud. (Penal Code, art. 704.) As made by the evidence in this case, there is not a tittle of testimony which, it is claimed, in any manner sustains the allegations of threats and fraud as the means used in accomplishing the entry. If sustained at all, the conviction rests solely upon the allegation of an entry by "force." It is shown by the evidence that the house was open—not a door or window closed—and that defendant, in his stocking feet, entered through the open doors without the consent of any one, and without any force whatsoever being used against the building or any occupant therein, to effect the entry. As to the character of entry,

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the case is identical in its allegation and proofs with that of *Hamilton v. The State*, 11 Texas Court of Appeals, 116, in which it was held that such evidence did not sustain an allegation of entry by "force" under our statute concerning burglary, and that case was reaffirmed in *Ross v. The State*, 16 Texas Court of Appeals, 554. In *Allen v. The State*, 18 Texas Court of Appeals, 120, it was held that to warrant a conviction the evidence must prove beyond a reasonable doubt the entry as alleged. In Carr's case, 19 Texas Court of Appeals, 659, it is said: "We conclude, if at night, force of any character, whether applied to the building or not, if resorted to to effect an entry, comes within the term 'force' used in article 704 of the Penal Code."

The general charge of the court to the jury did not submit the law applicable to the facts as to the entry as proved. A requested instruction upon that phase of the evidence was refused, and exceptions were reserved to the charge as given, for insufficiency in that regard and also for refusal of the special instruction. We are of opinion that both exceptions are well taken. The refused instruction was, in substance, that the charge in the indictment being "by force in the night time," the entry must be proven as alleged beyond a reasonable doubt. No other entry can sustain a conviction in this case. "Force" and "break," as used in the indictment, mean violence used by defendant to obtain entrance into the house, and any violence is sufficient. If the language in which this instruction was couched was, in the opinion of the court, calculated to mislead the jury, he could have changed it so as to avoid that effect. At all events, the instruction was sufficient to call attention to a material and eventually important omission in the given charge, and the same should have been supplied.

We are of opinion that the evidence as to the entry is not sufficient to sustain the charge nor the conviction for burglary. And this seems to be the opinion of our Assistant Attorney General, as ingeniously expressed in his brief.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered November 12, 1887.

Statement of the case.

No. 5715.

JORDAN SMITH v. THE STATE.

1. **PRACTICE—SPECIAL JUDGE.**—Three modes only are prescribed by statute for the election, selection or appointment of a special judge. 1. If the regular judge fails to appear at the appointed time and place for holding his court, an election of a special judge for the term shall be held in accordance with the provisions of articles 1094 to 1100 of the Revised Statutes. 2. If the regular judge is, from any cause, disqualified to try a case, the parties thereto may select a special judge to try the case by agreement. 3. If the parties fail to agree, the district judge shall certify the fact to the governor, who shall appoint a special judge to try the case. In either event, it is required that the person elected, selected or appointed to serve as special judge shall, before entering upon his duties, take the oath of office required by the Constitution; and the manner of his selection or appointment as special judge, together with the reason therefor, and the fact that the oath of office was administered to him, "shall be entered upon the minutes of the court as part of the record in the cause;" and the same must appear in the transcript on appeal.
2. **SAME—CASES DISTINGUISHED.**—With respect to the selection of the special judge to try this case, the entry in the transcript reads as follows: "Hon. J. M. Maxcy was selected by the State and defendant, and was sworn to try the case of *The State of Texas v. Jordan Smith, No. 2868.*" *Held*, indefinite and insufficient, in that it does not show the administration to the special judge of the constitutional oath. Note the opinion for the distinction between this and *Early's case*, 9 Texas Ct. App., 484.
3. **THEFT—EVIDENCE—VARIANCE.**—THE INDICTMENT in this case charges the theft of a "beef, an animal of the cattle kind." The proof shows that the alleged stolen animal was a cow. *Held*, that the term "cow" is embraced in the term "beef," and that there is no variance between the allegation and the proof.
4. **SAME—CHARGE OF THE COURT.**—Purchase of the animal was the defense relied upon by the defendant in this case, and it was an issue raised by the evidence. It was, therefore, the duty of the trial court, however improbable the evidence supporting the issue may have appeared, to submit the issue in charge to the jury, and the failure to do so was material error.

APPEAL from the District Court of Walker. Tried below before J. M. Maxcy, Esq., Special Judge.

The conviction in this case was for the theft of a beef, the property of James Spiller, and the penalty assessed was a term of two years in the penitentiary.

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James Spiller was the first witness for the State. He testified that, in January or February, 1882, he missed his certain red-roan four year old cow from her range. About the same time he received information that the defendant had recently killed a beef. He then got his neighbor, Mr. Oliphant, and his two sons, Tom and Bailey, and a negro named Bob Taylor, to go with him to defendant's house to see what discoveries he could make. He sent Tom Oliphant to get Mr. J. G. Johnson to meet them at defendant's house. Witness, Mr. Oliphant, Baily Oliphant and the negro reached the defendant's house a little in advance of Tom Oliphant and Mr. Johnson. They did not find defendant at home, but saw him at a distance from the house. They sent for him, and he and Jim O'Bryan came together to the house. Witness then told defendant that he had come in search of his cow, which he described. Defendant replied that he killed a beef a day or two before, but that it was a red and white "pided" beef that he got from Charley Bowen. He said further that he paid Bowen for the beef with money that he got from Doctor Thompson. Witness then asked defendant where the hide of the animal he killed was. He replied that he sent it to town by Jim O'Bryan. O'Bryan, upon being questioned, denied that he ever took a hide to town for defendant. Defendant then said that he sent the hide to town by Bob Handy, and, on being pressed, he corrected himself again, and said that the hide was taken to town for him by a convict who went to town in Mr. Johnson's wagon.

Witness then told defendant that it was his purpose to search the place for the beef. Defendant asked him if he had a search warrant. He replied that he had not, but that Mr. Oliphant, who was a justice of the peace, was present, and could very readily issue one. The witness's party then went to the defendant's smoke house, the door of which they found locked. Being told to produce the key, the defendant went into his house ostensibly to get it, but remained so long that witness ordered him to return and open the door, as he and his party were determined to get into the smoke house. Defendant reluctantly produced the key and the party entered the smoke house, in which, at the point expected by witness, they found a barrel of fresh beef. The parties with the witness at that time were Mr. Oliphant, Tom and Bailey Oliphant, Mr. Johnson and the negro Bob Taylor. Finding nothing but the barrel of beef in the smoke house, the party went out to look for the hide and the refuse portions of the animal slaughtered. On getting a few yards distant from

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the smoke house Tom Oliphant remarked that he saw a hide of some kind hanging up in the smoke house loft. The party then went back and found that the defendant's wife had relocked the smoke house door. She refused to produce the key until required to do so by defendant. The party then re-entered the smoke house and found two pieces of hide in the loft, which they took outside and spread on the ground side by side. It was discovered that a strip had been removed from the hide. The strip, if the hide belonged to the witness's animal, would have removed the brand, the brand being on the hip, and the strip being taken from that part of the hide. The ears were also missing from the hide. The hide was of the exact color of the hide of the witness's missing animal. Witness asked the defendant why the hide had been split. He replied that Johnson's wagoner split it to get a whip lash. Being further questioned about the missing strip, the defendant said that some person, not remembered by witness, cut the strip out to make "neck straps" with. Witness then asked defendant for the head of the slaughtered animal. He said that it would be found in the yard. An unsuccessful search of the yard was made, and the party went to the field, passing over a place where the unusual appearance of the grass attracted Tom Oliphant's attention. Returning to that place Tom Oliphant pulled up some of the grass, which, it was discovered, had no roots. The place was then dug into, and the feet and head were found. The head and horns and feet, in shape, color and size, resembled the head, horns and feet of witness's missing cow.

Mr. Johnson then asked defendant if the discoveries made did not look suspicious. He replied that it did, but that he did not know who buried the parts unless some of the women did. The place where the cow was slaughtered was then found near an old plum orchard, about one hundred and fifty yards distant from defendant's house. That spot had been covered by some one with moss and plum bushes. The witness and the parties with him then held a council, and Mr. Johnson, who owned the place where defendant was living, told defendant that he did not want cow thieves about him, and that he, defendant, could not stay any longer on the place. It was then determined to postpone the arrest of the defendant for a day or two upon the impression that he would leave the neighborhood, and by that means relieve the neighbors of his presence. As expected, the defendant left at once, and witness did not see him again for several years, when he was brought back by the sheriff and

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placed in custody. The hide, horns, head and feet found on defendant's premises resembled closely the remains of witness's missing cow, and witness was satisfied, but of course could not swear with absolute certainty, that they were the remains of the identical cow he lost. The cow described by witness belonged to him, was on the range in his possession, and was taken from that range without the knowledge or consent of witness.

Cross examined, the witness stated that, in testifying that; in his opinion, the remains described were the remains of his animal, he based his opinion upon the color, size, age and sex of the slaughtered animal, as disclosed by the hide and the shape of the head and horns. Witness could not remember when he last saw his cow before he found the remains on defendant's place, but his animal was very gentle, and came up to the house very often. She would have been four years old in the spring of her disappearance—1882. Witness owned four red roan cattle on the range at that time, one of them being the animal in question, another an aged cow, and two of them heifers. On a former trial of this case witness testified that he had two red roan cattle at the time mentioned, but he went back before the jury of his own accord, corrected that statement, and testified that he had four head. Witness did not now remember that he went before the first grand jury that met after the alleged theft, but knew that he had been before several grand juries since the theft of this cow. Bob Taylor, the negro who was with witness and his searching party, was a convict. Green Whitehead was well acquainted with the witness's cattle in 1881 and 1882. Green Whitehead never, at any time, told witness that he had seen one of witness's red roan cows dead in the bottom. Witness had never before heard of one of his red roan cows being found dead in the bottom. On one occasion, just before the alleged theft, the defendant, in passing witness's house, told witness that he was going to get some cattle from Bowen. On his return from that trip he told witness that he could not get Bowen's cattle, as they were all under mortgage to Eastham.

James G. Johnson was the next witness for the State. He testified, in substance, that Spiller sent for him to meet him at defendant's house on the eleventh day of January, 1882 (as shown by witness's memorandum book), to assist in the search of defendant's premises for fresh beef and the remains of a slaughtered animal. The smoke house door was open when witness reached defendant's house. From this point the witness

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testified substantially as Spiller did as to what occurred on the defendant's premises, and as to what was discovered and how it was discovered, and as to defendant's statements concerning the matter. He testified, in addition, that, a short time before the search of defendant's house, defendant came to him to borrow money with which to buy several head of cattle, but witness did not let him have the money.

Bailey Oliphant, for the State, corroborated the witness Spiller in detail, and testified, in addition, that when the defendant claimed to have purchased the animal slaughtered from Bowen, he exhibited a bill of sale to support his statement. That bill of sale was not signed by Bowen, but by one C. E. Ella, and transferred an animal wholly different in color from the color of the hide found in the smoke house. Defendant's attention was called to the discrepancy between the description given in the bill of sale and the color of the hide found, as stated.

Doctor Thomasson testified, for the State, that, about November 17, 1881, he loaned the defendant money for the purpose of purchasing several head of cattle from Charley Bowen. Defendant paid the loan on January 1, 1882, and told witness that he could not and did not buy Bowen's cattle, because they were under mortgage to Eastham. The defense admitted that defendant left the country immediately after the search of his premises in 1882, and that he was brought back by the sheriff of Walker county.

The State proved the venue, and closed.

Green Whitehead, the first witness for the defense, testified, in substance, that he lived on Spiller's place in 1881 and 1882, and attended to and knew Spiller's cattle. In January, 1882, Mr. Spiller owned three red roan cattle over three years old, one being an aged cow, which was afterward sold. Spiller still had one of the said animals, and one of them disappeared, and was the animal which Mr. Spiller claimed was killed by defendant. This witness, designating no particular time, said that he saw the dead body of a red roan cow in the bottom on the range of Spiller's cattle. That cow had been drowned. Witness then thought, and told a party with him that he thought the dead body was one of Spiller's red roan cows. That party replied that he did not think so. The witness knew the cattle belonging to Charley Bowen at that time, and on which Mr. Eastham had a mortgage. Among them was a red roan cow, very much like Spiller's missing cow. Witness afterward gathered the Bowen

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cattle covered by Eastham's mortgage and delivered them to Mr. Eastham's agent. The red roan cow belonging to Bowen was not among those so gathered and delivered by witness to Eastham's agent. Witness was present at Spiller's house when defendant passed it returning to his home from Bowen's. He heard defendant tell Spiller that he did not get the Bowen cattle because they were under mortgage to Eastham, but witness understood him to also say that he was going back to see Bowen about the cattle. The witness knew that Charley Bowen left the country shortly afterward. Witness did not personally know why Bowen left. On his cross examination the witness said that he never told Mr. Spiller that he saw the dead body of a red roan cow which he thought belonged to him, Spiller. Witness did not make a close examination of the dead cow, and did not know absolutely that it was Spiller's cow, but he thought so then. He did not see nor examine for brands on the dead body. The cow had been dead several days when witness saw it, and was about half devoured by vultures. The witness did not know what became of the Bowen red roan cow.

James O'Bryan testified, for the defense, that, at the time of the slaughter of the alleged stolen animal, the witness and his wife, Bob Taylor and the defendant's mother-in-law lived with the defendant and his wife, on the Randall place, then in charge of Mr. Johnson. The cow slaughtered was driven up with some oxen and other cattle by Bob Taylor. Witness was then confined to the house with the measles, and was not present at the killing. Defendant claimed the animal as one bought by him from Charley Bowen, and witness knew that, some time before the slaughter of the animal, defendant got some money for a bale of cotton he sold. About that time witness heard defendant and Charley Bowen talking about a proposed purchase by the defendant of a beef or beeves from Bowen. The feet of the slaughtered animal were left on the gallery for several days, and until witness heard the defendant's mother-in-law declare that they were becoming offensive, and she directed Bob Taylor to take them and bury them to prevent them from impregnating the air with stench. Bob Taylor took them off as directed, but witness did not know what he did with them. Witness did not see defendant when Taylor brought the beef to the house. Taylor, when he drove the beef up, was riding defendant's horse. Both witness and Taylor, who were being "furnished" by defendant, ate some of the beef. Witness did not know who killed the beef.

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Eliza O'Bryan, the wife of James O'Bryan, testified, for the defense, that a few days after the slaughter of the beef at defendant's house, she heard defendant's mother-in-law tell Bob Taylor to take the feet of the beef off and bury them, and she saw Taylor leave the house with them, taking a spade with him. Defendant claimed that he bought the animal from Charley Bowen.

Davis Thompson, the brother-in-law of the defendant, testified, for the defense, that, a short time before the alleged slaughter of the beef on defendant's premises, he went with defendant to the house of Charley Bowen, and saw Bowen point out to the defendant three certain cattle, one being a red spotted cow, one a male, and the other a reddish roan heifer. On the following Monday, the witness, at defendant's house, saw the defendant pay Bowen some money for the cattle previously pointed out. Witness knew that Ella Bowen, the step-daughter of Charley Bowen, could write.

Mattie Smith, the defendant's wife, testified, in his behalf, that about a week before the slaughter of the beef involved in this prosecution, she was present and witnessed the transaction in which the defendant bought the slaughtered animal and some other animals from Charley Bowen. She saw Bowen point the cattle out to defendant, and she saw the defendant pay Bowen the purchase money for the same. The animal killed was one of the cattle so bought by defendant. The hide found in the smoke house by Spiller and others came off that animal. Bob Taylor drove the said animal to the house and killed it. Afterwards the feet were dragged to the house by the dogs. Witness's mother told Taylor to take them off and bury them, to keep them from smelling. Taylor took the head and feet and a spade, and went off towards the place where they were afterwards found.

Benton Randolph, of the law firm of Abercrombie & Randolph, testified, for the defense, that, two or three years ago, his firm was employed to represent the defendant in this case. At that time defendant gave the said firm a bill of sale, in the handwriting of Doctor J. A. Thomasson, which purported to convey certain cattle from Charley Bowen to defendant. That bill of sale was burned, with other legal papers belonging to the firm, in January, 1887. According to the recollection of the witness, that bill of sale gave no description of the cattle conveyed, nor was it signed by Bowen, but purported to have been signed by some one else, whom witness understood to be a girl. Witness did not know that the bill of sale referred to by him was the

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same bill of sale exhibited by defendant to the State witness Oliphant.

Judge Abercrombie testified that, according to his recollection, the bill of sale described by Captain Randolph purported to convey three head of cattle, described only by marks and brands, and that it was signed "Ella," and he thought "C. E. Ella."

The motion for new trial raised the questions discussed in the opinion.

Abercrombie & Randolph, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. This case appears to have been tried below by a special judge. It is well settled that in such cases the record upon appeal must show the reasons for the selection of, and the manner in which he became special judge. (*Brinkley v. Hawkins*, 48 Texas, 225; *McMurray v. The State*, 9 Texas Ct. App., 207; *Snow v. The State*, 11 Texas Ct. App., 99; *Perry v. The State*, 14 Texas Ct. App., 166; *Wilson v. The State*, Id., 205, and *Harris v. The State*, Id., 676.) Three modes are provided by statute for the selection and appointment of special judges: First. When the regular judge fails to appear at the appointed time, etc., for holding his court, in which event an election of a special judge for the term shall be held in accordance with the provisions of articles 1094 to 1100 of the Revised Statutes, inclusive. Second. When the regular judge is from any cause disqualified to try a case, the parties thereto may select a special judge to try the same by agreement. (Code Crim. Proc., art. 570.) And third, where the parties fail to agree, the district judge certifies the facts to, and the Governor appoints a special judge to try the case. (Code Crim. Proc., art. 571.) If selected in either of these three modes he must, before entering upon his duties as special judge, take the oath of office as required by the Constitution of the State; "and his selection by the parties, or appointment by the Governor, as the case may be, and the fact that the oath of office was administered to him, shall be entered upon the minutes of the court as part of the record of the cause," etc. (Code Crim. Proc., art. 572.)

In the case before us the only entry with regard to the special judge is the following: "Tuesday, September 20, 1887, Hon. J. M. Maxey was selected by the State and defendant, and was

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sworn as a special judge to try the case of *The State of Texas v. Jordan Smith*, No. 2668." This entry the clerk certifies to be found in his minutes, but it is entirely detached from, and disconnected with any of the other proceedings in the case. Whether it is a sufficient compliance with the statute is the question presented. No reason for the appointment, that is, that the district judge was disqualified, is stated; no agreement in writing to the selection of the special judge is set forth; no statement that he took the oath of office required by the Constitution is made, except inferentially.

In *Thompson's case*, 9 Texas Court of Appeals, 649, it was held that an agreement of counsel to appoint a special judge to try a cause should be perpetuated in writing, and such writing filed among the papers and made a part of the record.

In *Early's case*, 9 Texas Court of Appeals, 484, it was said: "In the absence of anything appearing to the contrary, we will presume that the regular judge was disqualified from some one of the causes of disqualification enumerated, and that on that account the special judge was selected for the trial, and that the proper oath was administered to him as such judge." But in that case the record affirmatively stated that the parties in open court agreed upon the special judge, and, further, that "he was duly sworn according to law." In the case we are considering, the statement is that "he was sworn as a special judge." This is certainly most indefinite. It does not inform us what oath was taken. If he did not take the Constitutional oath of office, he was not "sworn according to law." We are of opinion that the entry of the selection of the special judge is too uncertain in terms to show even a substantial compliance with the law. (See *Willson's Crim. Forms*, Nos. 644, 645, p. 299.)

In disposing of this case upon appeal, we are requested by the Assistant Attorney General, in view of another trial, to pass upon two other questions plainly arising upon the record. The first is as to whether there is a variance between the allegations in the indictment and the proofs with regard to the description of the animal charged to have been stolen. In the indictment the animal is described as "one beef, an animal of the cattle kind." In the evidence the animal is proved to have been a cow. The question is whether the word "beef" embraces "a cow." We are of opinion that it does, and that there is no variance. In *Duval v. The State*, 8 Texas Court of Appeals, 370, it was held that "one beef cattle" is a sufficient description of a

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stolen bovine in an indictment for theft. Mr. Webster says the word "beef" includes the bull, cow and ox, in their full grown state; and this, we think, is the common acceptance of the word.

Upon the other matter, the charge of the court is radically deficient. The only defense relied upon was a purchase of the alleged stolen animal. This may, in the estimation of the learned trial judge, have been a pure and manifest fabrication; nevertheless, as it was the issue made by evidence and a question the truth of which it was the province of the jury alone to pass upon, it was his duty to submit it to them under appropriate instructions in the charge. (*White v. The State*, 18 Texas Ct. App., 57; *Irvine v. The State*, 20 Texas Ct. App., 13; *Wimberly v. The State*, 22 Texas Ct. App., 506; *Bond v. The State*, 23 Texas Ct. App., 180; *Shuler v. The State*, Id., 182.)

The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered November 12, 1887.

No. 2478.

STEVE TAYLOR v. THE STATE.

1. RAPE—AGGRAVATED ASSAULT AND BATTERY—CHARGE OF THE COURT.—

The first count in the indictment in this case charged a rape upon a female over the age of ten years, and the second count charged a rape upon a female under the age of ten years. Under preponderating proof of consent and non-penetration, but conflicting proof as to the age of the female, the trial court charged the jury as follows: "But if you believe from the evidence that there was not such penetration; but that defendant made an assault upon Hattie Gray, not with intent to commit rape upon her, but with intent to have sexual intercourse with her, with her consent, then you will find the defendant guilty of an aggravated assault," etc. *Held*, abstractly correct, but, in view of the evidence, erroneous in that it did not direct an acquittal if the jury believed from the evidence that the female consented to the sexual act, and was over the age of ten years.

- 2. SAME.—**Upon the issues of rape and consent the trial court charged the jury as follows: "If you believe from the evidence that the defendant did, as charged, have carnal knowledge of the said Hattie Gray, but

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have a reasonable doubt whether such carnal knowledge was obtained with her consent, the defendant should be acquitted unless you believe beyond a reasonable doubt that Hattie Gray was under ten years of age; in which event consent makes no difference." *Held*, that the charge, in view of the evidence which clearly disproved carnal knowledge, was erroneous because it rested the defendant's right to acquittal upon a hypothesis eliminated by the proof.

3. **SAME—ASSAULT.**—The charge is otherwise erroneous in that, under the proof, it failed to instruct the jury in substance, that defendant should be acquitted of assault to rape or aggravated assault if the female was not under the age of ten years and consented to the act of the defendant.

APPEAL from the District Court of Kaufman. Tried below before the Hon. Anson Rainey.

The conviction in this case was for an aggravated assault, and the penalty assessed was a fine of five hundred dollars. It was had under an indictment which charged the appellant with the rape of Hattie Gray.

Hattie Gray, the alleged injured party, was the first witness for the State. She testified in substance, that on November 6, 1886, the day alleged in the indictment, she was sent by her mother to the potato patch in Doctor W. H. Pyle's field to get some potatoes. The potato patch was northwest from Doctor Pyle's residence. She met the defendant in a path which traversed the potato patch, he being at work in the patch digging potatoes. The defendant asked her to "give him some." She refused, whereupon the defendant seized her, threw her to the ground, got on top of her and introduced his male member into her sexual organ. Witness not only did not consent to the sexual act, but resisted and tried to get the defendant off of her after he got on, and hallooed several times. The defendant's private organ was about an inch and a half in diameter, and anywhere from eight to twelve inches in length. He penetrated her private organ to the depth of about an inch and a half. Defendant at first offered to give witness some wax if she would consent to the sexual act. She refused, and defendant forced her in the manner stated.

Cross examined the witness said that defendant, while on her, held her hands with one of his hands, and with his other hand held his sexual organ. Witness saw Hill Wilkins when he passed through the potato patch about ten steps from the place of the outrage. He passed while defendant was on top of witness, and

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witness, at that very time, was hallooing. When defendant released witness, she buttoned her drawers, got her potatoes and took them home to her mother. She did not report the outrage to her mother immediately, but did so about bed time on that night. Witness did not know her present age, nor how old she was when she was outraged by the defendant.

Hill Wilkins testified, for the State, that in the evening, on or about the day alleged in the indictment, he had occasion to pass through Doctor Pyle's field. When he reached the potato patch he discovered a man and girl on the ground in the act of sexual intercourse. Witness did not recognize the parties at first, and stopped and looked at them for full ten minutes. He then started to pass on, when the parties discovered him and got up, and witness recognized the defendant and Hattie Gray. Hattie got her potatoes and started home at once. She did not halloo while witness saw her under defendant, but twice said: "Don't do that; do quit." Upon recognizing defendant, witness said to him: "Steve, what does this mean? I would be ashamed to have such doings with a little girl like that." Defendant replied: "It is nothing but a poor farm scrape. I will fix it up with her so that nothing will ever be said about it, and it won't get out." Defendant then went to Hattie and said something to her which the witness did not hear. On his return witness said to him: "You ought to be ashamed of yourself; and you ought to be in the penitentiary." The defendant replied that he was ashamed, himself, of his conduct, but that he did not force the girl; that she came to the patch and he told her that he would give her some wax to submit to him; that she agreed, and they proceeded with the act. Witness could not say how long exactly he stood and watched the carnal act, but between ten and twenty minutes.

On his cross examination the witness stated that the act of copulation between defendant and Hattie Gray occurred about an hour before sun down on Saturday, about the time in the month of November, 1886, alleged in the indictment. Before leaving defendant, witness told him that he would see that the law handled him for his conduct with the girl. Witness met old "Aunt Charlotte" at church on the next day and reported the matter to her. He did not see Hattie's mother until the Monday following the act, when he told her. Witness saw Hattie at Sunday school on the day after her experience with defendant. He did not see Hattie button up her drawers when defendant got off her. Wit-

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ness's reason for watching the parties in *flagrante delicto* was that, astounded to find anybody in Kaufman county capable of the act described, he determined to ascertain who the parties were by waiting until they got through. When Hattie Gray went away from the patch she did not walk like she was in pain or had been hurt by the operation, but walked off rapidly. She did not weep, nor did she halloo at any time while witness was present.

Fannie Gray testified, for the State, that she was the mother of Hattie Gray, the alleged injured female. She sent Hattie to the patch on the evening of Saturday, November 6, 1886, to get some potatoes. Hattie brought the potatoes home, but did not tell the witness anything about the outrage upon her. Witness first heard of it at Sunday school on the next day. Hattie was not ten years old at the time of the rape, nor at the time of this trial. Witness could not remember the year of her birth, but knew that she was born on Mr. C. C. Nash's place, during the summer preceding Mr. C. C. Nash's death.

Cross examined, the witness said that Hattie was chewing gum when she got home with the potatoes, and she told the witness that she got the gum from defendant. She said nothing to witness about the outrage upon her until after the witness's return, on the next day from Sunday school, where she met Aunt Charlotte, who told her what she heard from Hill Wilkins. Witness thereupon spoke to Hattie about the matter, and Hattie said that she did not tell witness because she was afraid witness would whip her. Hattie did not, on her return from the patch, walk like she had been hurt or was in pain. She went to Sunday school on the next day. Witness afterwards washed Hattie's underclothes and drawers, but found no blood or indications of blood on any of them. Hattie never suffered in any manner from the effects of the alleged outrage.

Doctor Mathewson testified, for the State, that in his opinion Hattie Gray, the alleged outraged female, was ten or twelve years old. It was possible that a girl of her age could be raped, but improbable that penetration by rape could take place. Judging from the size and development of the girl, and the physical stature of the defendant, and the diameter and attenuated length of his private organ as described by the girl, the witness would say that defendant did not succeed in penetrating the sexual organ of the girl. The vestibule of the privates of a girl of the age and physical development of Hattie ranged in size from that

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of a nickel to a twenty-five cent piece. Penetration of such an organ by such an organ as that which, under the evidence, pertained to the defendant, would inevitably produce laceration of the female parts, subsequent hemorrhage and a culminating soreness of the parts too severe to permit walking by the injured party. Had penetration of Hattie's organ been accomplished on Saturday, under the circumstances detailed by her, she could not have attended Sunday school on the next day. By penetration, the witness meant the passage of the penis into the vaginal canal, which he considered impossible in this case without succeeding hemorrhage from Hattie's parts. The penis of the defendant might possibly pass through the *labia majora* of Hattie's organ without producing hemorrhage. Doctor Lindsey, the next witness for the State, testified substantially as did Doctor Mathewson, and the State closed.

Doctor W. A. Mulkey testified, for the defense, that he had been a practicing physician and surgeon for thirty years. He stated that the sexual organ of a girl of the size and development of Hattie Gray, as a general rule, never exceeded the diameter of a nickel. The witness had never, in the course of his thirty years of practice, seen one so large in diameter as a twenty-five cent piece. The organ of a girl of the size and development of Hattie Gray could not be penetrated by the organ of a boy just arrived at the age of puberty, without producing laceration, hemorrhage and soreness. If Hattie's organ had been penetrated by the organ of the defendant, as described by her, intense laceration, hemorrhage and soreness of her parts would have resulted, and she could not have gone to Sunday school on the next day, nor have left her room for several days. Consent of the female to the sexual act imparts expansion to her parts, whereas resistance or unwillingness will produce contraction of the parts. The witness was positive that the vaginal canal of Hattie's sexual organ could not be penetrated by the penis of the defendant without laceration, hemorrhage and soreness resulting. Nor could the *labia minora* have been penetrated without such results, although the *labia majora* might possibly have been entered without the consequences named ensuing.

Doctor W. H. Pyle testified, for the defense, substantially as did Doctor Mulkey.

The defense closed.

The State, in rebuttal, introduced Charley Nash as a witness.

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He testified that he was not positive as to the year of the death of his father, C. C. Nash, but he thought that he died in 1878.

On his cross examination, this witness stated that, according to the best of his recollection, the girl Hattie Gray was born on his father's place during the visit of his father to Lampasas springs, which was in the summer of 1875. Hattie, to the best of witness's recollection, was two or three years old, and was running about, at the time of the death of the witness's father.

Woods & Cunningham, for appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. Under an indictment for rape appellant was convicted of an aggravated assault and battery. The indictment contained two counts, the one alleging the female to have been under the age of ten years, the other that she was over that age.

There was serious conflict in the testimony as to whether the female was under or over the age of ten years at the time of the alleged rape. If under ten, we can not comprehend, under the facts, upon what ground such a verdict was returned. How it was possible to reduce the offense below an assault to rape, we never expect to understand. On the other hand, if the girl was over ten years of age, the facts strongly showing that she yielded her consent, appellant was guilty of no offense.

The learned judge charged the jury upon the subject of aggravated assault as follows: "But if you believe from the evidence that there was not such penetration, but that defendant made an assault upon the person of Hattie Gray, not with intent to commit rape upon her, but with intent to have sexual intercourse with her, with her consent, then you will find defendant guilty of an aggravated assault," etc.

This charge is abstractly correct, but, when considered with reference to the facts, it was calculated to mislead the jury. If the girl was over ten years of age, and consented, there was no assault of any kind. If she did not consent, and defendant did not intend to rape her, but intended to have carnal intercourse with her, then there was an aggravated assault. This last view of the case was presented to the jury by the above charge, but the first phase was not, in any part of the charge.

It is shown by a large preponderance of the testimony that the girl consented; and, if over ten years, defendant should not have

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been convicted of any grade of offense, and the jury should have been instructed that, if they believed the girl was over ten, and consented to what was done by defendant, they should acquit.

It is true that the learned judge gave this charge, which follows the above: "If you believe from the evidence that the defendant did, as charged, have carnal knowledge of the said Hattie Gray, but have a reasonable doubt whether such carnal knowledge was obtained with her consent, the defendant should be acquitted, unless you believe beyond a reasonable doubt that Hattie Gray was under ten years of age, in which event consent makes no difference."

In this charge the jury can acquit if they believe defendant had carnal knowledge by consent of the girl, provided she was not under ten years of age. The proof clearly negated carnal knowledge; hence the hypothesis upon which acquittal could rest is eliminated. Again, there is no allusion whatever to an assault. The jury are in no part of the charge told that defendant should be acquitted of assault to rape, or aggravated assault, if the girl was not under ten years of age, and consented to the act of defendant.

The proof in the record cogently tends to establish these facts, and it was of the first importance to the defendant to have this proposition submitted to the jury. We are of opinion that if the jury had been thus instructed, under the facts of this case, a different verdict would have been returned.

For the omission in the charge, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered November 12, 1887.

No. 2456.

EX PARTE WILLIAM HENSON.

HABEAS CORPUS FOR BAIL—FACT CASE.—See the statement of the case for evidence adduced in a habeas corpus proceeding for bail under a charge of murder, *held* insufficient to support a judgment denying bail.

HABEAS CORPUS on appeal from the District Court of Wilson. Tried below before the Hon. George McCormick.

Statement of the case.

The relator was held under a capias charging him with the murder of E. T. Wingate in Wilson county, Texas, on the thirtieth day of April, 1887. Upon the hearing of his writ of habeas corpus bail was refused, and the relator was remanded to the custody of the sheriff. The judgment rendered below is reversed, and, by order of this court, bail is awarded in the sum of five thousand dollars.

John Bryan was the first witness introduced by the relator. He testified that he saw the shooting of Wingate by the relator, which occurred at or near the depot in Floresville, Wilson county, Texas, on the thirtieth day of April, 1887. Wingate, when he was shot, was sitting in his wagon with Mr. Goss. Witness was looking at the relator when the fatal shot was fired, and did not see Wingate when he received the shot, but he thought that at that time Wingate's back was towards the relator. Relator got the Winchester rifle with which he shot Wingate from a scabbard attached to the saddle of a horse standing near the depot. He rested the gun on the horse's back, took deliberate aim and fired. He then reloaded the gun but did not fire again. The relator and Wingate were between forty and fifty feet apart when the fatal shot was fired.

Cross examined, the witness stated that the deceased got out of the wagon after he was shot and went to the depot door, about twenty feet distant, where he sat down for about five minutes before he fell over. Witness reached him about the time he fell over, and, with William Bryant and Thomas, cut his clothes off. The ball entered the back just below the left shoulder blade, and passed entirely through the body. Witness saw no weapons of any kind about the body of the deceased, nor could any be found about the wagon. Witness turned his eyes to deceased immediately after the gun fired, and caught sight of him just after he got to the ground from the wagon. He then had no weapon in his hands, nor was he making any hostile demonstrations towards the relator. Immediately after he was shot Wingate exclaimed: "Give me a gun! He has murdered me! Tell my wife that he assassinated me; shot me in the back!"

Dave Dennis was the next witness for the relator. He testified that he was present when Wingate was killed by the relator. The killing occurred at the railroad depot about a mile and a half from Floresville. Witness and the relator, traveling in different wagons, reached the depot near the same time on the

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fatal morning. About two hours before the shooting, witness and the relator started to the jail with the jail guard to see a prisoner. Before getting to the jail the relator declined to go on, because, as he said, Wingate was somewhere about the jail, and he did not want to see him.

John Cryer testified, for the relator, that he went with the relator, in the same wagon to Floresville on the morning of the tragedy. The relator then lived with Bud Cryer, at the latter's house, about five miles from Floresville. Relator told the witness that he was going to the Floresville mill for meal for Mrs. Cryer, the mother of Bud, and the aunt of the witness. Witness was with the relator on that morning until the fatal shot was fired, and knew that the relator and Wingate had no prior meeting on that day. Some two or three weeks before the killing, the witness met Wingate, and Wingate told him that he intended to commence shooting at the relator the first time he got within one hundred yards of him. Witness told the relator of this remark. On the Saturday before the killing, the deceased, while talking to witness, said that the relator was a d—d bastard and that his mother was a d—d old bitch. Witness reported these statements to the relator at the time he told him of the threats, which was during the first part of the same week in which the killing took place.

Cross examined, the witness said that Lon and Frank Pennell, the latter as large and as old as witness (seventeen years), were present when Wingate said that he would commence shooting at relator as soon as he approached within a hundred yards of him. A pistol was taken to Floresville in the wagon with witness and relator. On reaching Floresville the relator placed the pistol in his pocket.

Tom West testified, for the relator, that some time in February, 1887, during the pendency of proceedings to place both the deceased and the relator under peace bonds, the deceased, talking to the witness in Floresville, said that he and the relator had agreed not to place each other under peace bonds. In the same connection he said that the relator, whom he characterized as a "d—d son of a bitch" and a "d—d mountain hoosier," whose "mother was a d—d bitch ahead of him," was glad to drop it. He then said that he intended to kill the relator if he ever got in his way; that he would blow relator's brains out if he ever caught him in the right way. Witness told James West and other persons of the statements and threats made by deceased. Witness

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had known deceased casually about ten years, and intimately about three years. Deceased's reputation was that of a violent, dangerous and determined man, and one in every respect likely to execute a serious threat.

On his cross examination, the witness said that his feelings towards deceased had not been very friendly for the last year. He had known the relator about ten years. His relations with the relator were friendly only. Tubbs was present and heard the deceased's statements and threats. They were uttered some time after the relator had beaten the deceased with a pole. The relator was about twenty years old, and by marriage was a cousin to witness.

James West testified, for the relator; that his brother, Tom West, told him what the deceased said about the relator and his mother, and that he told the relator, on the day before the killing, that he heard that deceased had been talking badly about his, relator's, mother.

Mrs. George Onslow, for the relator, testified that, in a conversation with Mr. Rose, in her presence, about two weeks before the killing, the deceased said that he intended to kill the relator the first opportunity he got.

Malvin Cryer testified, for the relator, that, at the time of the killing, the relator was living with him, about five miles from Floresville. About a month before the killing, deceased passed the field in which the witness and the relator were at work. When he reached a point on the road opposite the witness and the relator, he discharged his gun. The shot, however, did not pass near witness or the relator. Deceased was then traveling the public road in a wagon. It was not usual for travelers to discharge firearms on the public road. The relator had not been to Floresville for two weeks prior to the killing. The witness intended going to Floresville on that day to get some meal, but, his mother deciding to wash, witness abandoned the trip to help her, and got the relator to go in his stead. The reputation of the deceased was that of a violent, dangerous man.

On his cross examination, this witness said that John Cryer went to Floresville with the relator on the day of the homicide. Witness saw the relator put his pistol in the wagon when he started to Floresville.

James Gentry testified, for the relator, that he lived about a mile and a half from the house of the deceased. On or about March 1, 1887, the deceased, in a conversation in the hearing of

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the witness, said: "We heard that Henson and Mr. Clark were going to San Antonio, and that they would camp one night on the road. We went to look for the camp, and, if the man who told us had not lied about where they would camp, we would have found them, and, if we had found them, we would have killed Henson." After that, about April 1, 1887, when the relator was endeavoring to secure the appointment of constable, the deceased said to witness: "Henson need not think that getting to be constable will keep me from killing him. I had just as soon kill an officer as anybody else." Witness often heard the deceased say that the relator's mother was an indecent woman. Witness told Davis Wade of these several statements made by the deceased.

Mrs. Wingate, the widow of the deceased, testified, for the relator, that the relator lived at the house of the deceased for several months prior to January, 1887. He was absent about three weeks during that time, but returned upon the solicitation of the deceased. The witness had often heard the deceased utter threats against the relator. A school exhibition was held in the neighborhood in April, 1887. The deceased insisted that his daughter Mintie should attend; that he wanted her to see him kill the relator, and that the exhibition would give him a good opportunity to kill him. Mintie declined to attend the exhibition, partly because she did not wish to go, and partly because witness told her that she had better never leave home than be the cause of anybody's death. A short time prior to the killing, the deceased spoke of a dance soon to be given at the house of a Mr. Rose. He said that he thought the relator would attend that dance, and that he would find an opportunity then to kill him. Deceased talked incessantly, almost, day and night, about the relator, charging everything that was bad against him and his mother, and reiterating his intention to kill the relator upon the first opportunity that should present itself. He commanded the witness to write a note to the relator, telling him that he could have and marry Mintie. His purpose in this, he declared, was to entice the relator to the house and kill him. The witness refused to write the note, and the deceased became very angry with her for refusing. The deceased was a very determined man. He had always been truthful to witness, and was a man who, in her opinion, was in every respect calculated and likely to execute a serious threat. He carried arms at nearly all times.

On her cross examination, the witness said that she told Mr.

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Spooner, the district attorney, that the only threat she had ever heard the deceased make was that he would kill the relator before he should marry Mintie. Witness and deceased had discussed the possible marriage of their daughter and the relator prior to the time that the relator knocked deceased down with a pole, which occurred on the twelfth day of January, 1887. That difficulty occurred in this wise: On the said January 12, the deceased, then in the horse lot at his place, called to the relator, who was in the deceased's house, to come to the lot. He called in an angry manner, using oaths. The relator went to the lot, and soon the witness heard the deceased talking angrily and cursing. She heard the relator say: "Ned, I don't think you ought to talk to me in that way; I always do what I can to please you." Deceased replied: "God d—n you, I will talk to you as I please." The witness then looked through the kitchen door, and saw that deceased had a pole drawn on the relator. Thinking a fight imminent, she went back into the house, screaming. When she got quiet she went out to the lot and found the deceased on the ground with two cuts or bruises on the head. The relator had mounted one of the deceased's horses and gone off. The deceased was confined to his bed for some days by his injuries, during a part of which time his mind was flighty. During his confinement he required the witness to stop the cracks in the walls of the house, alleging his fear that the relator would shoot him through them. On the night of January 16, the fourth night after the collision in the horse lot, and while deceased was yet confined to the bed, the relator entered the deceased's house and bed room with a shot gun. The witness sprang between the relator and the deceased, covering the deceased's body with her own, and Mr. Tubbs caught the relator. The deceased did not own a shot gun, Winchester or pistol, but had Parson Seale's shot gun, and a negro's Winchester borrowed. During the deceased's confinement with his wounds, the witness, as directed by him, wrote to W. O. Murray to borrow a pistol, for the purpose, the deceased said, of protecting himself. The negro's Winchester was returned a few days before the killing. Deceased did not take a gun or other weapon with him to Floresville, on the fatal day, so far as the witness knew.

Davis Wade testified, for the relator, that a few days after the deceased got out of bed after having been knocked down by the relator, the deceased came to witness's house and told him that

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a man told him of the purpose of the relator and a Mr. Clark to go to San Antonio, camping out one night; that he hunted for the camp, and but for his informant lying to him about where the camp would be pitched, he would have found the camp and killed the relator and Clark. He said further that he would embrace the first opportunity to kill the relator, whose mother was a "d—d old whoreing bitch." Witness told these matters to the relator just a week before the killing. Witness had often heard the deceased say that if he ever met the relator in the right place he would shoot him down like a wolf, and he knew that the deceased, who nearly always went armed, bore the reputation of a violent, dangerous man.

Two witnesses testified that the relator and all of his relatives were exceedingly poor, and that the relator could not give a bond exceeding one thousand five hundred dollars.

The relator then closed.

Douglass Goss testified, for the State, that he got into the deceased's wagon about fifty yards from the depot, and occupied a place on the same seat with the deceased. The deceased then drove to the depot, and was in the act of stopping his horses when the witness heard the report of a gun fired behind him. Deceased sprang to his feet instantly, and after standing in his wagon about five seconds got out and walked to the depot door, where he sat down. He then said: "I told you he would shoot me in the back." Just after the gun was fired the witness saw the relator behind a horse, over the back of which he had fired. Deceased was not looking towards the relator, nor was he displaying any weapons or making any demonstrations when he was shot. He had no gun nor pistol in his hand when he was shot. It was possible that deceased may have turned his head and discovered the relator without the witness's knowledge.

J. M. Bates testified, for the State, that he was in his store near the depot in Floresville when the fatal shot was fired. The relator came into the store a few minutes before and asked for a drink of water. After getting a drink he passed out of the store at the back door and walked to the window on the side of the store, through which the witness next saw him with a Winchester rifle in his hand. He placed the rifle over the back of a saddled horse and took deliberate aim. He then lowered the gun and examined it. The witness next saw the smoke from the discharge of the gun, and immediately afterwards the relator passed around the horse and started towards the depot. He was

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met by Dennis and Gouger. He still had the gun in his hand, but did not attempt to shoot it a second time. Witness afterwards saw where the ball fired from the gun struck the depot building. A person standing at that point could not see a person standing where the relator stood when he fired the gun. Anderson Smith claimed the horse and gun.

Anderson Smith testified, for the State, that he rode his horse into Floresville about two hours before the killing of Wingate. His Winchester was attached to his saddle. He hitched his horse near the side window of Bates's store. While at his horse the relator came up, took witness's gun from the straps, examined it and asked witness if it was loaded. Witness replied that it had a hull in it. Relator then threw the hull out and a cartridge in and put the gun back in the straps. Just after the shooting witness saw Dennis and Gouger with the relator. Mr. Gouger had witness's gun. On his cross examination, the witness said that it was a common practice for a person meeting another with a gun to examine the gun, throw out empty shells and load it and ask questions about the gun, and that the relator's actions did not excite his suspicion. Before he examined the gun the relator tried to borrow it from the witness.

A. G. Thomas testified, for the State, that he was standing at about the center of the depot building when the fatal shot was fired. On turning when he heard people rushing about, he saw the relator with a gun in his hand standing about midway between Bates's store and the depot. Dennis and Gouger soon reached the relator and disarmed him. They handed the gun to the witness, who took it to the depot. When he reached the depot he saw Wingate sitting in the door, bleeding profusely. Wingate asked witness for the gun, and said: "He has murdered me! Let me kill him. I told you he would shoot me in the back, and you wouldn't believe me." Witness gave the gun to Jennings and went to and examined deceased. The witness described the wound, and said that deceased had no weapons on his person.

W. O. Murray testified, for the State, that he was in Floresville at the time of the homicide. About two hours before the killing he saw the relator standing near the Lopez building. At the same time the deceased was standing near the meat market, about one hundred and twenty feet distant from the relator. There was nothing to obstruct the view between the Lopez building and the meat market, and, while the witness did not know

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that the relator then saw the deceased, he knew that if he looked in the direction of the deceased he could have seen him.

E. Y. Seale testified, for the State, that Wingate came into his office on the morning of and before the shooting, and remained about one and a half hours. It was the recollection of the witness that the relator came into witness's office while Wingate was there. A great many people were in and out of the office on that morning. It was possible that relator could have entered and left the office without seeing Wingate.

A. R. Stevenson testified, for the State, that in January or February before the killing, proceedings to place both deceased and the relator under peace bonds were instituted in the justice's court. The friends of the two parties intervened, prevailed upon them to abandon the proceedings, and the complaints against each were dismissed.

A. J. Williams, for the relator.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. After a careful consideration of the evidence in this case as it is presented in the record, we are not satisfied that the "proof is evident" that the applicant is guilty of murder in the first degree. We therefore reverse the judgment denying him bail, and grant him bail in the sum of five thousand dollars.

Ordered accordingly.

Opinion delivered November 16, 1886.

No. 2702.**ALLEN CARROLL v. THE STATE.**

1. **VERDICT** in the case reads as follows: "We, the jury, find the defendant guilty, as charged in the indictment, of murder in the first degree, and assess his punishment at life time in the penitentiary." *Held:* sufficient.
2. **AUTHENTICATION OF ORIGINAL PAPERS.** — When original papers are ordered sent up with the transcript, they should be forwarded with the transcript, and their identity be verified by proper certificate of the clerk, and separately from the transcript.

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Opinion of the court.

APPEAL from the District Court of Caldwell. Tried below before the Hon. H. Teichmueller.

The conviction in this case was in the first degree, for the murder of M. Cloran, and the penalty assessed against the appellant was a life term in the penitentiary. There is no statement of facts.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. It seems to be sought on this appeal to present the question of the sufficiency of the verdict to support the judgment of conviction. As entered of record, and as it appears in the transcript, the verdict is in proper form and in all respects sufficient.

We find attached to the transcript what purports to be the original indictment in the case, upon which is indorsed in pencil writing what purports to be a verdict, and, if authorized to do so, we might presume that said paper is the original indictment and verdict in this case, ordered by the trial court to be sent to this court. But said paper is not certified to by the clerk of the trial court; is in no manner identified as the original indictment and verdict herein. We are not authorized to consider said paper as a part of the record before us, it being in no way authenticated. Where original papers are ordered to be sent up with the transcript, they should be forwarded with the transcript, and their identity verified by proper certificate of the clerk, and separately from the transcript. (*The State v. Morris*, 43 Texas, 372.)

There is no statement of facts or bill of exception in the record. We find the indictment and charge of the court to be free from defects, and there is no error apparent of record. The judgment is affirmed.

Affirmed.

Opinion delivered November 16, 1887.

Statement of the case.

No. 2616.

34	315
28	170
29	616

H. HENNING v. THE STATE.

1. **PRACTICE—EVIDENCE—CHANGE OF VENUE** was applied for by the accused upon an affidavit setting out the existence of such prejudice against him in the county of the forum as would deprive him of a fair trial. This affidavit was met by the State on affidavit impeaching the means of knowledge of the compurgators of the accused, and upon this issue the trial court permitted the State to call a witness and ask him "if there was sufficient prejudice against the accused in Tarrant county to prevent a fair trial." The defense objected to the question as not pertinent to the issue. *Held*, that the evidence indicated was admissible as bearing upon the means of knowledge of the compurgators, and the objection was properly overruled.
2. **SAME—CONTINUANCE** is properly refused if, in view of the evidence on the trial, the absent testimony as disclosed in the application is either immaterial or is probably untrue. Note the statement of the case for such testimony set forth in an application for a continuance.
3. **SAME—JURY LAW—BILL OF EXCEPTIONS** reserved to the overruling of a challenge to a juror for cause, is not complete, nor will it be considered by this court if it neither shows that the juror served on the jury, nor that he was challenged peremptorily by the accused, and that an objectionable juror was forced upon the accused after his peremptory challenges were exhausted.
4. **MURDER—SELF DEFENSE—CHARGE OF THE COURT—FACT CASE.**—The evidence presenting only the conflicting theories of murder of the first degree on the one hand, and perfect self defense on the other, the trial judge correctly confined his charge to those two issues, and properly refrained from charging upon murder of the second degree and manslaughter. See the statement of the case for evidence held sufficient to support a conviction for murder of the first degree.

APPEAL from the District Court of Tarrant. Tried below before the Hon. R. E. Beckham.

The conviction in this case was in the first degree for the murder of R. W. Townsend, and the penalty assessed against appellant was a life term in the penitentiary.

G. H. Brown was the first witness for the State. He testified, in substance, that he lived in the city of Fort Worth on the third day of April, 1886, when the deceased was killed. He was then employed as yard master in the yards of the Gulf, Colorado & Santa Fe Railway Company. He then knew, and for some

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time had known, the defendant. The defendant, on April 3, 1886, was employed in the blacksmith shops of the Fort Worth & Denver City railway, in the said city of Fort Worth. The "strike" then existing did not involve the Fort Worth & Denver City railway. While at work in his yards early on the morning of April 3, 1886, the witness saw three or four men coming towards his yards from the direction of the Denver railway shops, which were situated a few blocks east of where the witness then was. They crossed the Santa Fe track on Seventeenth street, some sixty feet south of the witness, and proceeded west with said street towards Main street. All of the parties, save possibly one, carried Winchester rifles. Among the parties the witness recognized one Harden, one Nace, a one armed man called Pierce, and the defendant. The defendant had a gun. None of the parties spoke to witness, nor did witness speak to any of them. This was about ten o'clock in the morning. An hour or an hour and a half later the witness saw the coal train on the Missouri Pacific track pass through Fort Worth, going south, the sheriff of Tarrant county having his posse on board as train guards. When witness first saw the defendant and his companions, they were coming from the direction of a large crowd then congregated near the junction of the railway track, and near the Denver City railway shops. Witness did not see the defendant again until he was tried on habeas corpus for the killing of Townsend, at the cut, about three miles south of Fort Worth.

W. L. Dorsey testified, for the State, that, at the time of and during the "great strike" of 1886, he was employed as a clerk in the freight depot office of the Texas & Pacific railway company, in Fort Worth. While at work at his desk, on the morning of April 3, 1886, witness's attention was called to a squad of armed men who came into Main street from around the corner of Joseph H. Brown's building, on Seventeenth street. Five or six persons were in the crowd, all or nearly all of them carrying guns. Witness did not know all of the men, but recognized the defendant and Hardin, Nace and a one armed man named Pierce. Several of the clerks went to the depot doors and observed the crowd, but nothing was said by any of the clerks nor by any of the crowd. Witness then mounted a freight car on the track and watched the party in its progress south on Main street, until it disappeared over Tucker's hill. Main street runs north and south. The Texas & Pacific railway depot was situated on the

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east side of that street, a short distance from Joseph H. Brown's building. It was about eleven o'clock in the morning when witness saw the crowd as stated.

A. Bridgman and W. Morton testified substantially as did Dorsey as to the crowd passing the Texas Pacific depot and going south on Main street, but did not claim to know any of the parties.

F. J. Ray testified, for the State, that on April 3, 1886, he was train master for the Denison division of the Missouri Pacific railway. It was the business of the witness to order and direct the movements of trains on the said railroad, to and from Fort Worth. For some time previous to the said April 3, 1886, the movement of trains on said railway had been prevented by "strikers." On the morning of the said April 3, the witness directed that a coal train, to consist of an engine, a caboose and ten coal cars, should be made up at Hodge, a small station on the Missouri Pacific railway, about four miles north from Fort Worth, and proceed to Alvarado, a station on said road, about thirty miles south of Fort Worth. Engineer Ed. Smith was placed in charge of the engine, with C. E. Nicewarner as fireman. A posse of officers was placed upon the said train by the sheriff, at witness's request, to guard it in its passage from Hodge through Fort Worth and towards its destination at Alvarado. The train passed through Fort Worth about fifteen minutes after twelve on that day. It passed through Fort Worth without stopping. Within an hour the said train returned to Fort Worth, bringing the wounded officers Sneed, Fulford and Townsend. At a point about two and a half or three miles south of Fort Worth, the track of the Missouri Pacific railway is crossed by the track of the Fort Worth & New Orleans railway. The shooting was said to have occurred at that crossing.

W. T. Maddox, sheriff of Tarrant county, testified, for the State, that on the third day of April, 1886, he had under his orders a posse organized to suppress a riotous combination that, for several days, had been practically in possession of the Missouri Pacific railway yards in Fort Worth. This riotous combination had prevented the railway company from operating or moving its trains, by such means as "killing" the engines and uncoupling the cars. Witness was officially called upon to quell the disturbance, and his posse was organized for that purpose. For two or three days prior to the said third day of April witness had labored hard to protect the train men in the opera-

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tion of the trains, and during that time he saw large crowds of strikers congregated in the yards, disabling trains, etc. On the morning of April 3 witness detailed a number of his posse to go to Hodge and board the south bound coal train, while he distributed the remainder of his posse in the railway yards. R. W., or "Dick," Townsend, was one of the posse detailed and sent to Hodge. The posse was placed on the train to guard it through Fort Worth and take it South. A crowd, consisting of at least a thousand men, congregated at and about the railway yards before the said coal train arrived, and as the train approached the yards, bound south, the said crowd rushed towards it with a "whoop." It was also "flagged" by a Mrs. Eagan and another woman, but it made no stop.

J. J. Fulford was the next witness for the State. He testified, in substance, that he was one of the detail of the sheriff's posse placed on the coal train at Hodge, on the fatal April 3. The said detail was ordered by the sheriff to escort the train through Fort Worth to the junction of the Missouri Pacific with the Fort Worth & New Orleans railway, at the "cut," about three miles south of Fort Worth. Witness boarded the said train at a point north of Fort Worth, and went with it through Fort Worth and to the junction. His position was on the running board of the engine, on the east side. When the train reached the yards in Fort Worth it was "flagged" by two women, but the train passed through the yards and the large body of strikers there collected, and moved south, without stopping. No obstructions were encountered until the train approached within about one hundred feet of the switch at the crossing of the Fort Worth and New Orleans railway, where it was discovered that the switch was thrown, and the train stopped. Witness did not see who threw the switch, but just as the train stopped he saw a party of four or five men standing near the switch, on the east side of the Missouri Pacific track. As soon as the train stopped, Officers Jim Courtright, Jim Thomason, Rufe James and Dick Townsend jumped off the engine and started towards the switch, by which time the parties near the switch started towards the train. Courtright and his party met them, placed them under arrest, and searched for arms, of which none were found. Courtright then placed Townsend in charge of the men, and with Thomason and James, started back towards the engine. Witness was then on the ground, just east of the engine. About the time that Courtright and his party started back towards the engine, the

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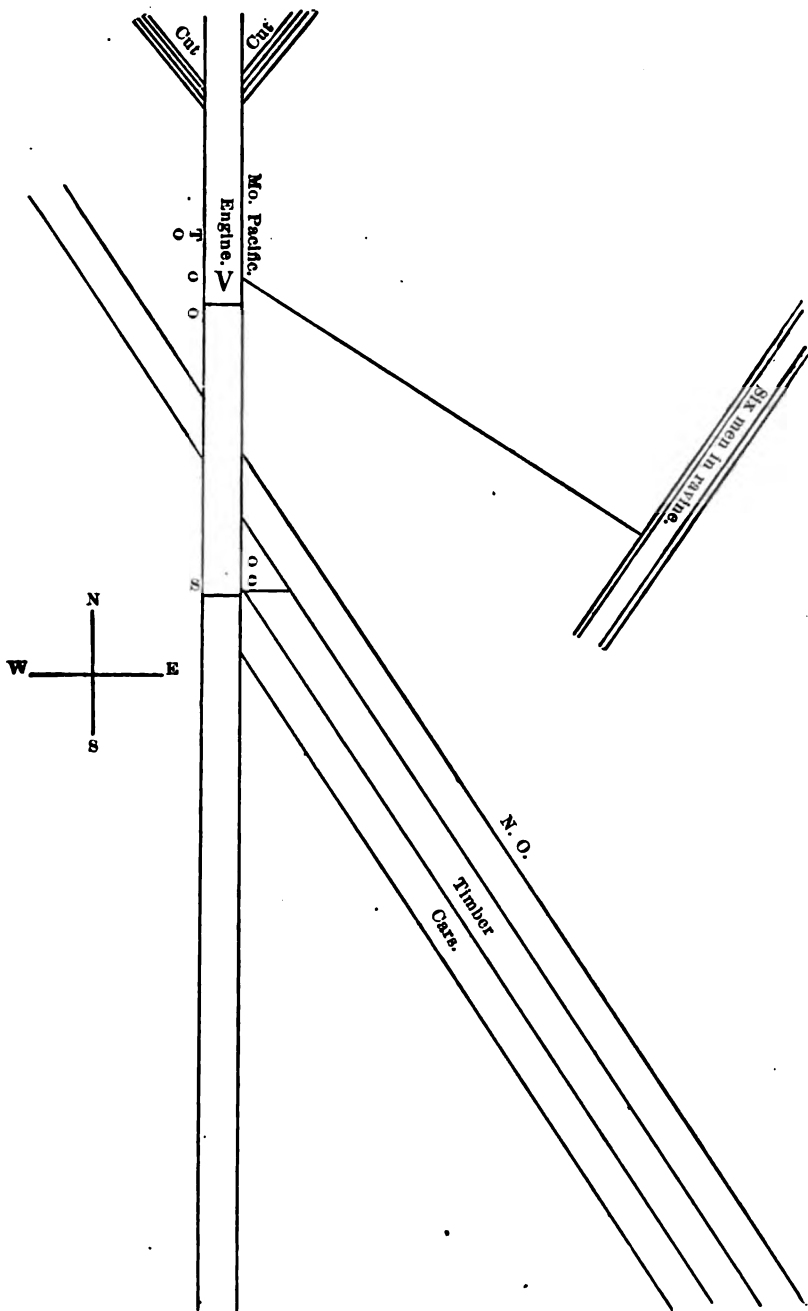
witness, looking southeast from the engine, saw a party of five or six men, armed with Winchesters, squatted or kneeling behind a ravine, about seventy-five or one hundred yards from the engine. Their guns were pointed directly at the engine. Witness, seeing that the men were going to shoot, motioned his hand towards the ravine and called to them: "Gentlemen, don't shoot." Witness had not yet drawn his pistol. Witness had hardly uttered the words quoted, when the parties behind the ravine fired their first volley. Witness then began to scramble for a position on the other side of the engine, when a ball struck and broke both of his legs. He rolled over to the embankment, drew his pistol and commenced shooting. The witness saw the man Hardin fire the shot that struck him. The first shot fired was the one that struck witness. None of the officers, so far as witness saw or knew, drew their pistols until after the first volley was fired by the men in the ravine. Among the men who had guns and fired from the ravine, the witness recognized the defendant and Hardin, Nace and Pierce. The volley fired by the men at the officers opened the fight, and the firing became general. The officers had pistols only, which were not effective at the long distance between the contending forces, and the strikers had Winchesters. Witness and Officers Charley Sneed and Dick Townsend were wounded in the fight, Townsend dying on the same evening. The ground on the battle field sloped from west to east. There was a cut in the embankment, at a point immediately north of the switch. Part of the train was in that "cut" when the fight occurred. It was impossible for those on the engine to see the parties in the ravine until the engine passed through the cut. Townsend, when shot, was facing the men in the ravine. Witness was then in front of Townsend, lying on the ground, with both legs broken.

C. E. Nicewarner testified, for the State, that he was fireman on the ill fated coal train which left Hodge on the morning of April 3, 1886, bound for Alvarado. Twelve or fifteen officers, serving as an escort, were on board that train. Two women flagged the train on its passage through the yards, but it did not stop. Witness's position as fireman was on the east side of the tender. The cut mentioned by previous witnesses was about a train's length north of the switch at the crossing of the Fort Worth and New Orleans railway, three miles south of Fort Worth. When the train going south emerged from that cut, witness, looking southeast, saw five or six men intrenched be-

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hind a ravine about two hundred yards distant. Some were kneeling, some lying down, and one was standing, all of them with Winchester guns bearing upon the engine. The train continued south until it reached a point about fifty feet north of the switch when it stopped, and witness saw that the switch had been thrown. He then observed four or five parties approaching the train from the direction of the switch. Courtright, Townsend, Thomason and James got off the engine on the west side, went to, arrested and searched the said five men, who were then placed in Townsend's charge. Courtright and Thomason then went towards the men in the ravine and called to them: "You will have to surrender." Instead of surrendering, however, the men in the ravine opened fire. At that time the officers had their pistols out and in their hands, but not one of them was presented. The officers returned the fire and the shooting became general. Townsend, while facing the ravine, at the head of the engine, was shot through the breast. During the fight some of the men crossed from the ravine to some piles of cross ties and nail kegs lying along the track of the Fort Worth and New Orleans track, and from that protection fired into the train. The fight lasted about ten minutes. The casualties to the posse showed officers Townsend, Sneed and Fulford wounded. They were placed on the train and taken to Fort Worth as soon as the fight was over. Had the train not stopped when it did the switch would have thrown it from the Missouri Pacific track to the Fort Worth & New Orleans track, and might have caused a derailment, or even a wreck. This witness was here shown a diagram of the battle ground, which he said he helped to make, and knew to be correct. It is as follows:

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Explaining this diagram, the witness said that the track of the Missouri Pacific Railway ran north and south. The Fort Worth and New Orleans railway track crossed the same from northwest to southeast. The switch connecting the side track of the Fort Worth & New Orleans railway with the Missouri Pacific was a little south of the crossing. The coal train halted with the head of the engine near the crossing. When the train stopped, Townsend took charge of the men arrested at a point near the head and west of the engine, which point is marked on the diagram with a dot under a T. When the stop brakes were applied, the train "slacked back" eight or ten feet, throwing the rear end of the train into the cut. The six men with guns were in the ravine, southeast of the engine.

J. W. Thomason, J. P. Witcher, W. R. Tucker and A. C. Brandon, officers, and Ed Smith, engineer, on board the coal train, testifying for the State, gave the same general account of the fight as that given by previous witnesses, all of them swearing that, while the officers had their pistols in their hands when Courtright summoned the men in the ravine to surrender, none of them had their pistols presented at the party. All of them testified that the men in the ravine opened fire, except Smith, who said that he was engaged with his engine at the time and did not know which party fired the first shots.

David Stewart testified, for the State, that he witnessed the fight from a barn, on which he was at work, about three hundred yards distant from the railway track. A few minutes before the coal train reached the cut, he saw five or six men armed with Winchesters run to and take position in the ravine, and, while the train was passing through the cut, witness saw four or five men manipulating the switch near the crossing. The train stopped before reaching the crossing, and the five men who had manipulated the switch were arrested and searched by some men who got off the train. The firing soon opened, the first shots being fired by the men in the ravine.

John Stephens was the next witness for the State. He testified that he was deputy sheriff of Hill county, Texas. Early in July, 1886, witness met the defendant in Cleburne, Texas. Defendant then proposed to go home with witness, who lived in the country, to spend the night. In the course of the conversation defendant said that he was in the fight near Fort Worth, and would soon tell the witness all about it. Witness and defendant then looked up Doctor Douglas, in whose wagon wit-

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ness came to town, and they got in the wagon with Doctor Douglas and started home. Defendant stayed with Doctor Douglas that night, and came to witness's house next day, and witness hired him to work for him. On the following day witness and the defendant went fishing, and on that day, and while fishing, defendant told witness about the fight. He said that they, referring to himself and those acting with him, received a telegram from Martin Irons, directing them to hold Fort Worth; that, acting upon that telegram, he and Hardin and Pierce and some others got Winchesters and took position in the ravine east of the crossing of the railroad track, their purpose being to stop the train; that they had left instructions with two women, one a Mrs. Eagan, to flag and stop the train on its passage through the yards and kill the engine, and that he, on the day before, showed Mrs. Eagan and the other woman how to kill an engine; and that it was understood that, if the women failed, he and his associates were to stop the train at the crossing; that the train stopped near the crossing, and some officers got off and arrested the men who threw the switch; that after arresting the men the officers started towards them and ordered them to surrender, and "for God's sake not to shoot;" that they fired upon the officers at once; that one of the officers fell, and Pierce asked him: "Who fired that shot?" that he replied, "I did;" that Pierce then said "By God, you got one of them!" He said that the officers had their pistols drawn when they called upon him and his party to surrender; that the man he shot was standing at the head of the engine, and was Sneed; that he, defendant, was the unknown man of the party; that the others were known and had been indicted, but that no bill had been found against him. The witness at once communicated the facts divulged to him by defendant to the officers of Hill and Tarrant counties.

Doctor Douglass testified, for the State, that when defendant, on the night stated by witness Stephens, stayed at witness's house, near Cleburne, he intimated to the witness that he was "on the dodge." Witness asked him what he was "dodging" for. He replied that he was in the fight of the strikers with the officers in the previous April. He said that since the fight he had been to Tennessee, Arkansas and the Indian Territory on foot.

J. H. Walker testified, for the State, that, on the tenth day of July, 1886, he met the defendant at a democratic primary meet-

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ing in Covington, Hill county, Texas. In the course of conversation witness asked him about the fight near Fort Worth between the officers and the strikers. Defendant appeared embarrassed, and requested witness to say nothing about the fight at that time and place, as he was in it. He said, in effect, that he used a Winchester gun in the fight; that his party went to the crossing to stop the train; that he would have killed his man had he not hidden his head behind the rails, and that a ball passed through his own clothes.

The State closed.

The first two witnesses for the defense testified, in substance, that they were near the crossing at the time the fight between the officers and the strikers occurred. Several shots were fired by parties on board the train, and before the train stopped. Neither of the witnesses saw anybody east of the crossing, nor did they hear or see any shooting from that direction.

R. H. Tucker testified, for the defense, that he heard Jim Courtright testify on the habeas corpus trial of the defendant, and that, on that trial, Courtright testified that Townsend was shot in the back, and that his, Townsend's, coat was powder burned. This witness testified, however, that he examined Townsend's body after it was brought back to Fort Worth. The ball entered the front of the body. There was coal dust on the back.

The defense closed.

The State introduced W. P. Thomas, who testified that he examined Townsend's body after it was brought back to Fort Worth. The ball entered Townsend's breast. The coat was not powder burned.

The motion for new trial raised the questions discussed in the opinion.

M. D. Priest, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. An application for a change of venue, alleging the existence of such prejudice against the defendant as would prevent him from having a fair and impartial trial in Tarrant county, supported by the affidavit of three compurgating witnesses, was filed in this case. To controvert this, the State presented an affidavit, sworn to by thirteen citizens, attacking the

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means of knowledge of the compurgators and denying the existence of such prejudice. This latter was supplemented by another affidavit, sworn to by six persons, covering the same ground of contest.

It is made to appear, by a bill of exceptions, that, after each of the three compurgators had been examined touching his means of knowledge and the existence of prejudice, the State called one Tucker, and asked him "if there was sufficient prejudice in Tarrant county to prevent a fair trial?" To this question the defendant objected, upon the ground that "the existence of prejudice was not in issue," and asked the court what was the issue to be determined, whereupon the court stated, in reply to said question, that "the means of knowledge of the compurgators was the issue to be determined, but that the court would overrule the objection and admit the evidence." This evidence was admissible as bearing upon the means of knowledge of the compurgators.

Respecting the application for a continuance, it is sufficient to say that, waiving the question of diligence, in the light of the subsequently developed testimony, the error in overruling the application—if error there was—became harmless, since the desired testimony was shown to be either immaterial or probably untrue.

The assignment of error with regard to the ruling that M. A. Chambers was a competent juror was not well taken. The bill of exceptions taken to the ruling does not show he either sat in the case or that he was peremptorily challenged by the defendant, and that an objectionable juror was forced upon him after his challenges were exhausted.

Upon the evidence, two theories of the homicide arose: The State's witnesses established a case wherein the appellant and those acting with him made an unlawful and deadly attack upon a sheriff's posse in the discharge of duty, of whom the deceased was one; part of the appellant's testimony went to show that the attack upon his party was begun by the posse, by the display and use of deadly weapons. If the State's version was the true one, the homicide resulting was murder of the first degree; the defendant's, if true—putting it in the light most favorable to him—showed a case of killing in self defense. Upon both these theories the instructions were full and fair; and the court was not required to charge upon either murder of the second degree or

Syllabus.

manslaughter, since neither could legitimately arise upon the evidence.

Other grounds of exception have received like careful consideration as those discussed, and none of them are believed to be tenable. We find no error of law in the record.

Upon the facts there is still less room for question. If the other evidence had left the guilty complicity of the appellant in doubt, there still remained to confute and condemn him his own declarations and confessions, made to unimpeached witnesses and deposed to upon the trial. The judgment will be affirmed.

Affirmed.

Opinion delivered November 16, 1887.

No. 2715.

JOHN BURKS v. THE STATE.

1. **PRACTICE—FORMER CONVICTION—VERDICT.**—The provision of the statute (Code Crim. Proc., art. 712) which requires that in passing upon a special plea (such as a plea of former conviction) interposed as a defense to a prosecution for crime, the verdict shall specially find whether the plea is true or untrue, is mandatory, and can not be eluded upon the ground that the failure of the verdict to so find worked no prejudice to the accused.
2. **SAME—FORGERY.**—The prosecution in this case was for attempting to pass a forged instrument to one H. The evidence adduced upon the plea of former conviction showed that the instrument described in the two indictments was one and the same, but that the other attempt was to pass it to another person than H., at a different time and place. *Held*, that the transactions were different, and constituted different and distinct offenses; wherefore a conviction for the one could not bar a prosecution for the other.
3. **SAME—EVIDENCE—INTENT—CHARGE OF THE COURT.**—As tending to establish the fraudulent intent of the accused in the transaction for which he was on trial, it was competent for the State to prove that, at a different time and place on the same day, the accused attempted to pass the forged instrument to a different person than the party alleged as the injured person in the indictment. But the failure of the charge to limit and circumscribe the purpose and object of such evidence was fundamental error.
4. **SAME.**—It is not only the province, but it is the duty of the trial judge to construe an alleged forged instrument, and to instruct the jury as to

24	326
32	226
24	326
136	124
37	484
37	485

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its legal effect, had it been genuine. In this case, the court properly charged that, if the alleged forged instrument were genuine, it would create a pecuniary obligation.

5. **SAME.**—Objections to the admission in evidence in this case of the alleged forged instrument were properly overruled, inasmuch as the letter S, before the figures \$43.00, imports nothing, is no part of the said instrument, and constitutes no part of the description of the said instrument.
6. **SAME—CONFESSIONS.**—The trial court did not err in admitting in evidence the declarations of the defendant with regard to the transaction involved in the prosecution, made by him when not in custody nor under arrest. Nor was it error to permit the State to prove that defendant was known by another name than that he assumed in the county of the forum.

APPEAL from the District Court of Taylor. Tried below before the Hon. T. H. Conner.

The conviction in this case, supplemented by a term of three years in the penitentiary as punishment, was had under an indictment which charged that defendant, on the twenty-sixth day of August, 1887, in Taylor county, Texas, attempted to pass to one H. A. Hart a certain forged instrument in writing, which, as shown in the indictment, and afterward in evidence, reads as follows:

“No. 5.

“BALLINGER, Texas, July 15, 1887.

“First National Bank of Ballinger pay to John Burks or bearer the sum off forty-three 43 dollars.

“S \$43.00.

D. E. Sims.”

To this prosecution the defendant pleaded specially his former conviction for attempting to pass the same instrument described in this indictment. The indictment attached to this plea as an exhibit described the same written instrument, but alleged the attempt to pass it on one R. S. Tuttle.

R. S. Tuttle was the first witness for the State. He testified, in substance, that, in August, 1887, he was a clerk in the dry goods store of Mr. Laposki, in Abilene, Taylor county, Texas. On the morning of the twenty-seventh day of that month the defendant and another person came into said store, and defendant asked to be shown some clothing. He then selected for purchase clothing to the amount of six dollars and twenty-five cents, and offered the witness in payment the check now in evidence. Witness told him to go back to the desk and indorse it. Defend-

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ant went alone to the desk, and witness saw him dip a pen into an inkstand, and then bend his body over the desk as if writing. He soon brought the check back to witness with his name indorsed on the back. The indorsement was yet ink wet when he again tendered it to witness. He then told the witness that he had been employed on the ranch of D. E. Sims, and that the check was drawn, signed and given to him as wages by Sims's wagon boss, who had authority from Sims, and ordinarily signed Sims's checks. Witness had no authority to accept the check, and declined to do so. Witness was positive that no person was with defendant at the desk when he indorsed the check. The witness testified, for the State, on another prosecution of this same defendant (Case No. 582) for attempting to pass a forged instrument, his testimony on that trial and on this being the same.

H. A. Hart testified, for the State, that, in August, 1887, he was clerking in Bledsoe's store, in Abeline, Taylor county, Texas. About nine o'clock on the night of August 26, the defendant and another person came into Bledsoe's store, and defendant selected for purchase five dollars and seventy-five cents worth of clothing, and offered witness the check in evidence, directing him to take pay out of it. He said that he received the check as payment for his work on the TOD ranch, on the Colorado river, near Ballinger. Witness handed the check to young Mr. Bledsoe, who declined to cash it, and handed it back to witness. Witness then handed it back to defendant, and told him to call again next morning. He called again between eight and nine o'clock on the next morning, and selected a handkerchief, making his bill seven dollars, and again presented the check. Mr. Bledsoe, the proprietor of the store, examined the check and declined to cash it. Defendant said then that he had worked for Sims, and that the check was signed by Sims's wagon boss, and was given to him for work. The check exhibited in evidence was the same offered by defendant to witness, but since that time it had been indorsed. Witness testified for the State, on a previous trial of the defendant in case No. 582, for an attempt to pass a forged check. His testimony on that trial was substantially the same as his testimony on this trial.

Albert Bledsoe testified, for the State, to the same facts as testified by Hart.

Robert Burch testified, for the State, that in August, 1887, he was constable of the Abeline precinct, in Taylor county. On the

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morning of the twenty-seventh day of that month, he saw the defendant standing near the bank corner, and, having heard some suspicions expressed about a check the defendant had in his possession, the witness called him and asked him about it. He said that the check was given him as a balance on wages due him as a late employe on the TOD ranch, and that he could get Mr. Watson, of Abeline, to identify him. Witness had not then arrested him, and had no warrant for him, nor had a complaint then been filed against him, but witness did not intend to let him get away unless he accounted for his possession of the check. Witness went with him to Watson, who failed to identify him, and then witness arrested him. Witness testified, substantially as he has here testified, in case No. 582, against the defendant for attempting to pass a forged check.

The State then introduced in evidence the check described in the indictment, and called D. E. Sims to the stand. Mr. Sims testified that he owned the TOD ranch, on the Colorado river, near Ballinger, but that he did not know the defendant; had never had the defendant in his employ on his said ranch or elsewhere; had never owed the defendant any sum of money; had never signed a check in his favor, and had never authorized anybody else to do so, and had never had a wagon boss in his employ. Witness had done his banking with the First National Bank of Ballinger for a year or more. He knew of no other D. E. Sims, nor of any other TOD ranch, than himself and his said ranch. The witness testified, for the State, in cause No. 582, against the defendant, for attempting to pass a forged instrument, substantially as he has testified on this trial.

J. E. Thomas testified, for the State, that he had known the defendant for ten years. He knew him in Callahan and Coleman counties as Buck White, and by no other name, and as the son of Mrs. White, whom the witness well knew.

The State closed.

The defense introduced in evidence the indictment described in the defendant's plea of former conviction, and the judgment of the court pronounced upon the verdict of the jury, and the case was closed.

The motion for new trial raised the questions discussed in the opinion.

No brief for appellant.

Opinion of the court.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. I. Defendant's special plea of former conviction is in due form, and upon its face presents a valid bar to the prosecution in this case. The trial judge properly, and under appropriate instructions, submitted the issue raised by said plea and the evidence adduced in support thereof to the jury, except that the jury were not instructed, as they should have been, that they must say in their verdict that the matters alleged in said plea were true or untrue. (Code Crim. Proc., art. 712.) It has been repeatedly held that where a special plea is submitted to the jury the verdict must expressly determine whether the plea is true or untrue, and that an omission to so find is error for which the conviction must be set aside. (*Smith v. The State*, 18 Texas Ct. App., 329, and cases there cited.)

It may be contended, however, that such omission is harmless and not reversible error where the evidence shows that the conviction pleaded was not for the same offense, but for an entirely different offense than the one for which the defendant was then on trial. Were it not for the mandatory terms of the statute, requiring the jury directly and expressly to state in their verdict their finding upon the plea, we would be inclined to so hold, but we think it best to adhere to the plain words of the statute, and the decisions heretofore made construing it. In view of another trial of the case, we will say that in our opinion the special plea of former conviction was not sustained by the evidence. Said former conviction was for attempting to pass a forged instrument in writing to a different person than the person named in this indictment, and, as the evidence conclusively proves, at a different time and place. The transactions were different, and constituted different offenses, although the forged instrument attempted to be passed was the same. The two attempts are as distinct and separate as would be two assaults committed upon different persons at different times and places, but with the same weapon.

II. Upon the trial the State proved, not only the attempt to pass the forged instrument to the party alleged in the indictment, but also that the defendant attempted to pass said instrument, on the same day, but at a different time and place, to another person. This evidence was admissible to prove the defendant's fraudulent intent with respect to the attempt for which he was on trial; but the court, in its charge to the jury,

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failed to restrict said evidence to the purpose for which it was admitted by proper instructions to the jury, which omission is reversible error, although not excepted to. (*Washington v. The State*, 23 Texas Ct. App., 336; *Maines v. The State*, Id., 568; *Davidson v. The State*, 22 Texas Ct. App., 373; *Taylor v. The State*, Id., 530.)

III. It was not only proper, but it was the duty of the court to construe the written instrument alleged to be forged, and to instruct the jury as to its legal effect had it been genuine. It was not error for the court to instruct the jury that the alleged forged instrument involved in this case would, if it had been genuine, have created a pecuniary obligation.

IV. It was not error to overrule the defendant's objection to the admission in evidence of the alleged forged instrument. There was no material variance between the instrument alleged and that offered and admitted in evidence. The letter S before the figures \$43.00, as it appears in the instrument set forth in the indictment, does not appear to be a part of said instrument, or to import anything. It certainly does not in any way affect the character of the instrument, and constitutes no part of its description.

V. It was not error to admit in evidence the statements made by the defendant to the witness Robert Burch, as the evidence satisfactorily shows that, at the time the defendant made said statements, he was not under arrest or in custody, but was a free man, and made said statements voluntarily. Nor was it error to permit the State to prove that the defendant was known in another county by a different name than the one he assumed in the county of the prosecution. This testimony was admissible for the purpose of identifying him, and as a circumstance tending to prove his intent with respect to the alleged forged instrument.

It is not necessary that we should determine the question presented with regard to the formation of the jury which tried this case, as that question will not arise on another trial.

Because of the errors we have mentioned the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered November 23, 1887.

Opinion of the court.

No. 2716.

JOHN BURKS v. THE STATE.

ATTEMPT TO UTTER A FORGED INSTRUMENT—EVIDENCE—CHARGE OF THE COURT.—While it was competent, in a prosecution for attempting to pass a forged instrument, for the State to prove that the accused attempted to pass the same forged instrument to another than the person alleged in the indictment, and at another time and place, it was incumbent on the court to charge the jury that such evidence was admissible only upon the issue of the fraudulent intent of the accused in the transaction on trial. Omission to so charge was fundamental error.

APPEAL from the District Court of Taylor. Tried below before the Hon. T. H. Conner.

The conviction in this case was for attempting to pass to one R. S. Tuttle, the same forged instrument which is set out in the statement of the preceding case of *Burks v. The State*. This is the cause referred to by the witnesses in the preceding case as the cause number five hundred and eighty-two on the district court docket of Taylor county. The penalty assessed in this case was a term of two years in the penitentiary.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. Upon the trial of this case, the State proved that the defendant attempted to pass the alleged forged instrument to another party than the one named in the indictment, and at another time and place. While this testimony was competent, as tending to show the intent of the defendant in attempting to pass said instrument to the party named in the indictment, it was nevertheless extraneous, and the court should have explained to the jury, in its charge, the purpose for which it was admitted, and directed that it could be considered by them for no other purpose, and that they could not convict the defendant for any other attempt to pass said instrument than the specific one alleged in the indictment. (*Burks v. The State*, ante, p. 326.)

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37 485

Opinion of the court.

Other questions presented in this record have been determined in cause No. 2715, between the same parties, just decided.

Because the court omitted to instruct the jury with respect to the testimony as to extraneous acts of the defendant, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered November 23, 1887.

No. 2704.

HENRY BORDERS v. THE STATE.

1. **GAMING.**—It is no offense against the laws of this State to bet or wager at a game played with dice or dominoes at a private residence.
2. **SAME—EVIDENCE—CHARGE OF THE COURT—FACT CASE.**—The evidence in this case showed that the house in which the playing was done was a private residence, but that it had been frequently resorted to for the purpose of gaming. Under this evidence, the trial court instructed the jury that, if the said house was “used commonly and exclusively for the purpose of gaming, defendant would be guilty, even though the house was a private residence.” *Held*, that the instruction was erroneous; and that, as the evidence shows that the house was a private residence, it does not support the conviction.

APPEAL from the County Court of Ellis. Tried below before the Hon. B. McDaniel, County Judge.

The opinion sufficiently discloses the case. The penalty assessed was a fine of ten dollars.

E. P. Anderson, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. It is not an offense against the law to bet or wager at a game played with dice or dominoes at a private residence. (Willson's Texas Crim. Laws, secs. 592-595.) In this case the evidence shows that the game bet at was played at a private residence. There was evidence showing that said resi-

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31	227
24	333
37	259

Syllabus.

dence had frequently been resorted to before the playing for which defendant was prosecuted, for the purpose of gaming.

In his charge to the jury the trial judge instructed that if the house where the playing occurred was "used commonly and exclusively for gaming, the defendant would be guilty, even though said house was ostensibly a private residence." This charge was excepted to by the defendant at the time of the trial, because not warranted by the evidence. We think said charge was erroneous, and we are also of the opinion that the conviction is not sustained by the evidence, the playing and betting having occurred at a private residence.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered November 23, 1887.

No. 2713.

FRANK MYERS v. THE STATE.

1. **THEFT—EVIDENCE—BRANDS.**—While a recorded brand is evidence of ownership, it and the brand found upon the animal must correspond and be identical, and it must appear on the part of the animal indicated in the record, or the discrepancy in this regard must be satisfactorily explained by the evidence. See the opinion for evidence held to show that the brand found upon the animal was different from the brand set out in the record, and, therefore, being the only evidence on the issue of ownership, and not sufficient upon that issue, is insufficient to support the conviction.
2. **SAME.**—See the opinion and the statement of the case for evidence held to have been improperly excluded, because, under the facts in this case, it tended to support an issue of identity of the animal.
3. **SAME.—CHARGE OF THE COURT.**—The evidence in this case tending to support the defense that the accused killed the alleged stolen animal by direction of his employer, the charge of the court was erroneous in not instructing the jury that if they believed that the accused took the said animal by direction of his employer, for the use and benefit of his employer, believing at the time that his said employer owned or had a right to appropriate the animal, then the accused would not be guilty of theft, because of the absence of the fraudulent intent.
4. **SAME—FACT CASE.**—See the statement of the case for evidence held insufficient to support a conviction for theft, because insufficient to support the allegation of ownership of the alleged stolen animal.

Statement of the case.

APPEAL from the District Court of Taylor. Tried below before the Hon. T. H. Conner.

The conviction in this case was for the theft of one head of cattle, the property of John A. Walker, in Taylor county, Texas, on the seventh day of January, 1887. The penalty assessed against the appellant was a term of two years in the penitentiary.

Deputy Sheriff James Humphreys was the first witness for the State. He testified that, on about January 7, 1887, he and Dick Cato went to the ranch of Dock Grounds, in Taylor county, to levy on some horses said to belong to Grounds. When they reached Grounds's ranch, they found the defendant and one Tom Short in the lot, skinning a beef. Witness asked them where any of Grounds's horses could be found. They told him that a bunch of horses had just passed beyond the hill. They displayed some uneasiness and a great anxiety for witness and Cato to leave. Witness and Cato got off their horses and proceeded to help defendant and Short with the beef. The witness knew the cow at the time, but said nothing about it. Cato cut the beef's head off. Witness helped to carry a quarter of the beef into the smoke house. He and Cato passed that night at the ranch and ate some of the beef. While the beef was being quartered, Cato turned up one side of the hide, looked at the brand, and said that it was a half circle S cow. The witness made no examination of the brands on the hide that night. On the next morning the witness called on Jack Green to show him the hide. The hide was found lying in the corner of the fence, with two strips cut out of it. No brands were found on the pieces of hide left. Witness, after examining the pieces of hide, started back to the house, and, en route, met the defendant. Defendant asked witness if he knew the cow, and witness replied that he did; that the cow was branded with a half circle S on the left side, and BEK on the right side. Defendant said that witness was right; that it was a straight S under a half circle, and that he had done wrong in killing the cow, and added: "I don't want you boys to give me away." Witness then arrested defendant, and some time later started with him to town. Defendant on the way made an effort to escape, but witness fired several shots at him, killed his horse and secured him. Witness did not shoot to kill, but to stop the flight of defendant. Witness had often, during

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the previous four or five months, seen the butchered cow on the range. All this occurred in Taylor county.

On his cross examination, the witness said that it was his understanding that Jack Green was the foreman of Grounds's ranch, and that defendant was an employe under him. When defendant asked witness not to "give him away," he said that for several days he had been looking for a cow in the Y—Y brand, but could find none fat enough for beef, and that he took the cow in question, thinking she was an estray. Two or three days after the arrest of defendant, witness went back to Grounds's ranch and arrested Tom Short.

Dick Cato testified, for the State, that he went to Grounds's ranch with James Humphries to execute a legal writ upon some of Grounds's horses. Defendant and Tom Short were skinning a beef in the lot when witness and Humphries arrived. During the time that witness and Humphries were helping defendant with the beef, as stated by Humphries, witness lifted one side of the hide and saw that it was branded with a half circle S, and perhaps with something else. When witness and Humphries first reached the ranch, defendant said that the cow was in the BIK brand, one of Grounds's "little brands." During the time that witness and Humphries were at the ranch, while the cutting up of the beef was in progress, Short and defendant showed considerable uneasiness and some anxiety for witness and Humphries to leave, and told them several times that they had recently seen some horses pass over the hill. On the next morning the defendant made several appeals to witness and Humphries not to give him away. The half circle S was known as the Peacock brand. When witness first reached the ranch, Short said that he knew nothing about the cow; that Myers drove her up, and called to him to bring him the gun, which he did. Myers at that time said the cow was of the BIK brand, which was one of Grounds's little brands.

On cross examination, the witness stated that he and Humphries reached the ranch on Friday evening, remained Friday night, Saturday and Saturday night, and started to town on Sunday. They did not arrest defendant until they started back on Sunday. The brands on the hide were dim, and the witness only traced the half circle S brand by running his finger over it. He did not decipher the other brand. The witness here made the brand, as follows: \bar{S} , and said that on the Tom Short trial he testified that the S stood straight up, but now thought

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that it was inclined—"slanchways." The brand, however, was dim and the hide was rumpled up, and witness could not positively say whether the brand was straight or inclined.

John A. Walker was the next witness for the State. He testified that he lived in Colorado City, Mitchell county, Texas. The witness, from December, 1886, to March, 1887, owned the old Peacock stock of cattle. Those cattle, with other property, were transferred to the witness as the assignee of Peacock Bros. & Co. The Peacock stock of cattle numbered about five thousand and head. The ranch of Peacock Bros. & Co. was in Tom Green county, and their holding brand was a lateral, lazy, or inclined S under a half circle. Most of the Peacock cattle, when in the possession of the witness, were in the old Peacock pasture, but there were some of the animals scattered over the range. No person but the witness had authority to handle, dispose of or control any of the Peacock cattle. Witness never authorized defendant nor any one else to kill the cow described in the indictment. After the witness took charge of the Peacock cattle as assignee, he found that a few of the cattle were branded BEK on the right side, and he was informed that the said BEK cattle were a small stock purchased and put in the Peacock "holding" brand. At the close of this witness's testimony, the State introduced the deed of assignment to the witness as the assignee of Peacock Bros. & Co., and the record of brands of Tom Green county, which showed the Peacock cattle brand to be a lateral or horizontal S with a half circle over it, placed on the left side.

The State rested.

Mrs. M. A. Butler was the first witness for the defense. She testified that defendant and Mr. Dock Grounds stayed all night at her house in Merkel, on or about January 4, 1887. On the next morning Grounds told defendant to go back to the ranch and kill a beef for ranch use.

T. C. Scott testified that he lived in Comanche county, Texas. He knew that there were two different stocks of cattle in the BEK brand in Comanche and Callahan counties, and that there was a law suit pending about them. Witness had been recently in jail for carrying a pistol. Witness defended the charge against him for carrying the pistol, on the ground that he was a traveler, but he was convicted. He had never before been under arrest.

Tom Short testified, for the defense, that, in January, 1887, he

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was employed as cook at the ranch of W. A. Grounds, in Taylor county. He was present when Grounds started to Merkel on the evening of January 3, 1887, to take the train to Abeline, and heard Grounds tell George Herron to tell Myers, when he came back, to kill the animal which was afterward killed by witness and Myers, for the use of the ranchmen. In the same connection Grounds said that somebody had barred out the brand on the said animal for the evident purpose of raising a dispute about her. He also told witness to pickle the meat. Defendant came back to the ranch on the following day, January 4, 1887. Herron was then there. Herron is now dead. Grounds did not come back before the cow was killed. Jack Green was ranch boss, and got back to the ranch on the evening that the cow was killed. D. Y. Russell, the ranch book keeper, was there when the cow was killed. Defendant was an ordinary hand on the ranch, and had nothing to do with supplying it with beef. Witness had been tried and acquitted of complicity in the offense charged against the defendant.

Cross examined, the witness stated that George Herron was a negro, and, according to witness's information, the said Herron met his death by hanging himself in the Nolan county jail. Witness did not remember that he told County Attorney Hardwicke that, if Hardwicke would dismiss the prosecution against him, he would tell Hardwicke all he knew about other matters, but that he knew nothing about the Myer's case.

D. Y. Russell testified, for the defense, that he was the book keeper on Dock Grounds's ranch at the time the cow involved in this prosecution was killed. Grounds then owned a large number of small herds of cattle in different brands that he had bought from time to time. Witness could not say, without referring to the books, how many brands Grounds owned, but thought there must have been between thirty and forty. Witness had no recollection of ever furnishing defendant with a list of the brands, and did not think defendant knew all of Grounds's cattle brands. Defendant did not furnish beef for the ranch consumption. Witness knew nothing about the cow that was killed, nor could he swear that Myers did not know all of Grounds's cattle brands. Witness did not recollect that he ever told County Attorney Hardwicke that defendant knew all of Grounds's brands.

Lige Carter testified, for the defense, that for six or seven years he had been outside boss for Mr. Bryant, a cattle man.

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He was pretty well acquainted with all the brands in the country. About two years before this trial the witness drove a certain brown and white crumpled horn cow from beyond the Colorado river to the range near Dock Grounds's ranch. That cow was branded with a straight S under a half circle, and the letters BEK, and she had a calf. Witness put the calf in the BEK brand, when he turned it and its mother loose. Witness did not know whether or not the cow about which he testified and the cow killed by defendant were the same. The defense proposed to prove by this witness that he put the BEK brand on the calf for Mr. Beck, of Callahan county. The court excluded that testimony, and the ruling is made the subject matter of the second head note of this report.

The defense introduced in evidence the following letter:

"AT RANCH, February 2, 1887.

"Frank Myers, Esq., Abilene:

"DEAR SIR: I understand that you are trying to get me into trouble by swearing, and trying to get others to swear, that I instructed you to kill a stray beef for the ranch, which you know is not so, for you know that I never had anything to do with beef killing on the ranch. Now, Frank, as you have commenced to try to injure me, I will not try to help you in any manner, for there are several little brands that you are suspected of keeping up, and may be proved on you at any time. You must remember the SAB brand, and what you done for that on three of my calves. Yours, etc.,

"W. A. GROUNDS."

The defense rested.

W. A. Grounds testified, for the State, in rebuttal, that it was not true, as testified by Tom Short, that he, witness, on the eve of going to Merkel, on January 3, 1887, in the presence of said Short, told one George Herron to tell defendant, when he got back to the ranch, to kill the particular animal described in this indictment, or any other particular animal, for beef, and direct Short to pickle the meat. He said nothing about somebody having barred the brand out, and that the easiest way to settle the dispute was to kill the animal.

Cross examined, the witness said that he wrote the letter introduced in evidence by the defense. He intended at first to help "the boys" in their trouble, but, when he found them trying to

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defend themselves at his expense, he decided to trouble himself no more about them. The three calves referred to in the letter as having been placed in the SAB brand belonged to witness, and were so branded without witness's consent. Mrs. M. A. Butler was milking the mothers of those calves at the time of the branding of the calves, but did not own the said animals as a gift from witness. Witness owned forty or fifty brands. He did not know them all himself, and did not think that defendant did. Defendant never furnished witness's ranch with beef. The manager, Jack Green, furnished the beef to the ranch. Witness never owned any cattle branded BEK or half circle S. His "holding" brand was Y—Y. That brand was on all of the stock in the brands purchased by witness, except a very few which were overlooked.

County Attorney Hardwicke testified, for the State, in rebuttal, that after Short's arrest, and while in jail charged with this offense, Tom Short sent for witness and told him that if he, witness, would dismiss the case against him, he would tell what he knew about other cases, but that he knew nothing about the case against the defendant.


The State closed.

Mrs. M. A. Butler testified, for the defense, in rebuttal, that the three cows and calves, referred to by Dock Grounds in his letter and in his testimony, belonged to her, and were given to her by said Grounds, and were put in the SAB brand by direction of Grounds. Witness was not married to Grounds, but had one child by him.

The motion for new trial raised the questions discussed in the opinion.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. To establish the allegation of the ownership of the alleged stolen animal, the State relies solely upon the brand upon said animal, undertaking to show that said brand was the recorded brand of the alleged owner. A certified copy of the record of the brand of said alleged owner was read in evidence by the State, and, as shown by said record, said brand is thus:  placed upon the left side of the animal upon which it is used. There is no evidence that this brand was found upon

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the alleged stolen animal. All the testimony shows that the brand found upon said animal was either a perpendicular S or an inclined S. It will be seen at a glance that the recorded brand and the brand found upon the alleged stolen animal are essentially different. While a recorded brand is sufficient evidence of ownership, such brand and the brand found upon the animal must correspond, and be identically the same, and the brand upon the animal must even be upon the particular part of the body designated in the record, or it will not afford sufficient evidence of ownership, unless the discrepancy is explained satisfactorily by other evidence. (*Harwell v. The State*, 22 Texas Ct. App., 251; *Priesmuth v. The State*, 1 Texas Ct. App., 480.) We are of the opinion that the evidence does not prove the allegation of ownership, and is therefore insufficient to sustain the conviction.

As the case must be remanded for another trial, we will notice and determine some other questions presented in the record, and which may arise on another trial. It was error, we think, to reject the proposed testimony of the witness Carter in regard to the brand BEK, which he testified he placed upon a certain calf. If said calf and the alleged stolen animal were the same it would be competent and material for the defendant to show that said brand was not placed upon said animal for and as the brand of the alleged owner, but for another person, whose brand it was claimed to be. Such testimony would tend to weaken the State's testimony respecting said brand by accounting for its presence upon the animal upon another hypothesis than that the animal belonged to the alleged owner, he having testified that he owned some cattle in that brand. While said brand, not being recorded, was incompetent evidence to prove ownership, still it was evidence to identify the animal, and it was the defendant's right, if he could do so, to explain away and destroy whatever probative force it might have against him.

There was evidence tending to show that the defendant killed the alleged stolen animal for beef, and that he did so by the direction of one Grounds, whose hired hand he was at the time. If he took said animal by direction of said employer, and for the use and benefit of said employer, believing at the time that his said employer owned or had a right to appropriate the animal, he would not be guilty of theft, because the essential ingredient of theft—that is, a fraudulent intent—would be wanting. (*Willson's Texas Crim. Laws*, sec. 1295.) There being some evidence

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to support this theory, the court should have submitted the matter to the jury under proper instructions. (Willson's Texas Crim. Laws, sec. 1306.)

We have examined other supposed errors complained of, but none of them are, in our judgment, substantial. The only errors committed are, in our opinion, those we have mentioned. Because of said errors, and because the conviction is not sustained by the evidence with reference to the allegation of ownership, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered November 23, 1887.

No. 2727.

AARON WILLIAMS v. THE STATE.

1. **FORGERY—PRACTICE—EVIDENCE.**—The State introduced in evidence the alleged forged instrument before proving that the same was written by the accused, but subsequently produced such proof. *Held*, that such practice, though irregular, was not materially erroneous.
2. **SAME.**—See the opinion for the contents of a written instrument *held* to be sufficiently certain to be made the subject of an indictment for forgery.
3. **SAME—EVIDENCE—CHARGE OF THE COURT.**—Three witnesses testified positively that the purported drawer of the alleged forged order authorized the accused to write it and sign his name. Under this proof the trial court erred in failing to instruct the jury affirmatively that if they believed that the defendant wrote the order, and signed it by authority of the purported drawer, or if they had a reasonable doubt on that question, he should be acquitted. Exception being reserved to the omission, a mere negative presentation of the question was not sufficient.

APPEAL from the District Court of Freestone. Tried below before the Hon. Sam R. Frost.

The conviction in this case was for forgery, and the penalty assessed was a term of two years in the penitentiary.

Peter C. Stubbs was the first witness for the State. The forged instrument being exhibited to him, he testified that he first saw it at Bounds's store in Wortham, Freestone county, Texas, when he went to settle his account. The account presented to him

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called for the amount of the order. Witness called for the order and at once denounced it as spurious. Bounds, however, insisted upon payment, and witness decided to pay it in preference to incurring the cost of litigation. Defendant was living on the witness's place at the date of the order, but not when the witness called at Bounds's store to settle the account. When the defendant left the witness's employ, he was in debt to witness seventy-nine dollars besides the order.

On his cross examination, the witness stated that the defendant was a renter on his land during the year 1884, until about the middle of September. The witness realized from the defendant's work only about ninety pounds of seed cotton and about fifteen bushels of corn. Witness had no recollection of being at the defendant's house on August 15, 1884. On the fourteenth day of that month, the defendant asked him for an order to Bounds for a pair of shoes, pants and shirt, which witness declined to give him. That request was made at the witness's house. It was not made of witness while witness was passing defendant's house, nor did witness then say to him: "I have no pencil; you write it and bring me the bill of goods and I will pay it." Witness did not afterwards meet the defendant in the road and say to him: "I see you have got the shoes and pants." Witness admitted that he told Donagan in July, 1886, that if he, Donagan, would pay him the amount due him from defendant he would not prosecute defendant. Witness subsequently told Wilder that he would not prosecute defendant if defendant would pay forty two dollars on his seventy-nine dollars account. Prior to this time, defendant told witness that he was sorry for what he had done, and that, if witness would not prosecute, Donagan would help him pay half what he owed witness. Witness had a conversation with Phil Leache since this term of court convened, in which Leache said that he knew nothing about the case. Witness told the said Phil Leache that if he, Leache, testified as he had heard it claimed he would—that witness authorized the defendant to write the order—he, Leache, would go to the penitentiary himself. The order was forged in August, 1884. Witness did not report it until February, 1886, because he wanted to get what was owing him by defendant. Donagan, at the close of his interview with witness, said that he would study about helping defendant pay out, but he never spoke to witness about the matter afterwards. When Wilder came to see witness about paying

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forty-two dollars on the account, he said that Donagan had told him that he could beat the case.

The State then introduced the alleged forged instrument, which reads as follows:

Wortham freston Co Texas.

Mr allen bounds please let Aran Williams have 1 par shose 1 par pants and charge the same by this. Aug the 16 1884

p c Stubbs.

J. V. Bounds, a member of the firm of Allen and J. V. Bounds, of Wortham, Texas, testified, for the State, that, on the day alleged in the indictment, the defendant presented to him the order upon which this prosecution is based. Mr. P. C. Stubbs at that time had an account at the store, and witness, not being familiar with Stubbs's handwriting, filled the order. During the fall of 1884, Mr. Stubbs called for his account, and asked that it be itemized. He took the itemized account home, but brought it back a few days later and objected to the items furnished the defendant on the said order. The witness exhibited the order to Mr. Stubbs, when Stubbs said: "That is my signature with a whoop, ain't it?" Witness replied: "I don't know but what it is your name."

On his cross examination, the witness said that he had often furnished goods to the defendant on Stubbs's account, but always, prior to this occasion, on Stubbs's personal order. Witness could not recollect that he and defendant had any particular conversation when the order was filled, nor that defendant told him that Stubbs authorized him, defendant, to write the order. He did not think, however, if defendant had claimed to have written the order himself, that he would have filled it without satisfactory evidence that it was authorized by Stubbs.

The State closed.

Phil Leache, the first witness for the defendant, testified, in substance, that he and his wife Alice were at the defendant's house on the day of the alleged forgery. Stubbs came by, stopped at the fence, called defendant, and gave him some directions about work. As he started to ride off, defendant called to him that he would like to have that order for a pair of shoes and pants. Stubbs felt of his pockets, and told defendant that he had no writing material with him, but for defendant to write the

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order, sign his name, get the goods and bring him the bill. He then rode off, and defendant wrote the order as directed.

Alice Leache corroborated her husband in detail, and testified, in addition, that during the present term of court, she heard Stubbs ask Phil Leache what he knew about the case. Phil replied: "You will hear when I go on the stand." Stubbs then said: "If you tell anything you heard, I will send you to the penitentiary for five or six years."

Nelson Williams testified, for the defense, that on the day after the alleged forgery he, in company with the defendant, met Mr. Stubbs in a lane near defendant's house. Stubbs said to the defendant: "I see that you got the pants and shoes." Defendant replied, "Yes." Stubbs asked: "Did you get the bill?" Defendant replied that he did, and handed Stubbs a bill, which Stubbs examined and handed back to him, with the remark, "that is all right." Witness and defendant afterwards examined the bill together.

The motion for new trial raised the questions discussed in the opinion.

Bell & Steele for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This is a conviction for forgery, predicated upon making without authority, with intent to defraud, etc., the following instrument:

Wortham freston Co Texas.

Mr allen bounds please let Aran Williams have 1 par shose 1 par pants and charge the same by this. Aug the 16 1884
p c Stubbs.

It appears that the instrument was introduced in evidence before it was shown that defendant wrote it, though this proof was afterwards made. This was irregular, but it was not reversible error.

Appellant contends that the instrument is of such deformity as can not be made the subject of forgery by proper averments in the indictment. We think differently. (See this subject discussed in *Rollins v. The State*, 22 Texas Ct. App., 548.)

There being two counts, one for forgery and the other for uttering the forged instrument, it is here insisted that the State

Syllabus.

should have been forced to elect upon which count it would prosecute. Not so in such a case as this.

The testimony of Phil Leache, Alice Leache and Nelson Williams, if true, clearly shows that Stubbs authorized defendant to write the order, and the defendant relied upon the authority from Stubbs to write the same. Whether the facts sworn to by these witnesses were true or false, the duty devolving upon the court was just as imperative to give in charge the law applicable thereto. This duty is not performed by a negative charge, nor by affirmatively charging that, in order to convict, the jury must believe beyond a reasonable doubt that the instrument was made without lawful authority. The testimony of the three witnesses named demanded a charge, in substance, that if the jury believed from the evidence that Stubbs gave defendant authority to write and sign the instrument, then they should acquit. Or, if the evidence upon this point raised a reasonable doubt as to whether Stubbs authorized defendant to write and sign the order, they should acquit. Due exceptions to the omission was made.

This court, in quite a number of cases, has stated the rule upon this subject to be that, whether requested or not, in felony cases it is the duty of the court to charge clearly and affirmatively the law applicable to every phase of the case; and especially to every defense presented by the evidence.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered November 23, 1887.

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28 300
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No. 2668.

J. W. MITTEN AND ROSALINE HAMILTON v. THE STATE.

1. PRACTICE—AMENDMENT—PLEA—JURISDICTION OF THE COUNTY COURT.
—The certificate of the clerk of the district court to the transfer of the cause to the county court recited that the term of the district court was held in December, 1885, and that the indictment was presented in that court on the eighteenth day of December, 1886. The said indictment alleged that the offense—adultery—was committed on the first day of December, 1884. The defense moved to quash the certificate because illegal and insuf-

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ficient, and filed a plea to the jurisdiction of the county court upon the ground that, if the certificate was correct, it showed that the indictment was presented more than two years after the commission of the offense, and that, therefore, the prosecution was barred by limitation. The motion and the plea were overruled upon the ground that the recital of 1886 in the certificate was a clerical error, and should have been 1885. *Held*, that the ruling was erroneous; the proper practice would have been to require the proper officer to amend the certificate. In default of such amendment the trial court should have sustained both the motion and the plea to the jurisdiction.

2. CHARGE OF THE COURT—ADULTERY, under the laws of this State, may be committed in either of two ways only; first, by the living together, and having carnal intercourse with each other of a man and woman, of whom either is married to some other person; or, second, by habitual carnal intercourse of such parties with each other without living together. The indictment in this case charging only the first mode of adultery, the trial court erred in charging the jury upon both modes of that offense.
3. SAME—FACT CASE.—The indictment charging the offense to have been committed in the first mode prescribed by the statute, and the evidence showing only that the offense was committed in the second mode, it does not support the conviction.

APPEAL from the District Court of Navarro. Tried below before the Hon. J. H. Rice, County Judge.

The appellants in this case were jointly tried and convicted upon an indictment charging them with adultery, on and before the first day of December, 1884. The penalty assessed was a fine of one hundred dollars against each of them.

The opinion discloses the substance of the indictment. The evidence established beyond dispute the existing marriage of the defendant Mitten with another female than the defendant Hamilton; and further, that, during the year 1884 he frequented the house of said Hamilton, and was often seen in situations indicating recent carnal intercourse with said Hamilton. The evidence, however, failed to disclose a living together of the said defendants.

The motion for a new trial raised the questions discussed in the opinion.

Beale & Autry, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

Opinion of the court.

WHITE, PRESIDING JUDGE. This trial in the county court was had upon an indictment transferred from the district court. In the county court, before entering upon the trial, defendants made a motion to quash the district clerk's certificate of transfer, and also pleaded to the jurisdiction of the county court, because the case was filed in said court upon an illegal and insufficient certificate of transfer. The certificate recites that the term of the district court was held in December, 1885, and that the indictment was presented on the eighteenth day of December, 1886, a year or more after the term of court commenced. It was further insisted that, if the certificate of the clerk as to the date of the presentment of the indictment was correct (to wit, eighteenth day of December, 1886), then, inasmuch as the indictment alleged the offense (adultery) to have been committed on and for one year prior to the first day of December, 1884, it was manifest that the crime, if any had been committed, was committed more than two years before the indictment was found, and consequently that the prosecution was barred by limitation of two years. (Code Crim. Proc., art. 200.) The motion and plea to the jurisdiction were overruled.

In certifying the bill of exceptions saved to his rulings, the county judge says that he, from an inspection of the record in the case, was satisfied that a clerical error was committed by the district clerk in writing 1886 for 1885. When, how and in what manner the county judge made the inspection of the record which satisfied him of the error, we are not informed. If there was an error, it should have been corrected or amended by the proper officer. (See *McDonald v. The State*, 7 Texas Ct. App., 113; *Hasley v. The State*, 14 Texas Ct. App., 217; *Donaldson v. The State*, 15 Texas Ct. App., 26; *Hawkins v. The State*, 17 Texas Ct. App., 593.)

The rulings of the court were erroneous, and the motion and plea should have been sustained, in case the prosecution refused or declined to amend or substitute a valid certificate. (*Brumby v. The State*, 11 Texas Ct. App., 114.) Presuming, from the judge's certificate to the bill of exceptions, that the transfer certificate is a clerical error which can be corrected by taking the proper steps, and that this, perhaps, will be done with a view to another trial, we will notice some matters which may prove of vital importance in the future conduct of the case.

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Adultery, under our statute (Penal Code, art. 333), may be committed in either of two modes: 1. By the living together and having carnal intercourse with each other of a man and a woman, of whom either is married to some other person; or, 2; by the habitual carnal intercourse of such parties with each other, *without living together*. (Collom v. The State, 10 Texas Ct. App., 708.)

In the case in hand, it is charged by indictment that the defendants "did then and there unlawfully live together in adultery, having carnal intercourse with each other, and did then and there have habitual carnal intercourse with each other." The indictment is sufficient only in so far as it charges a living together and carnal intercourse. It does not charge the second mode, or habitual carnal intercourse *without living together*, because it does not follow nor use the statutory words defining it, to wit, the words "*without living together*." These words are essential to charge the second mode of committing the offense. (Willson's Crim. Forms, No. 214, p. 107.) An indictment should follow and conform to the statute, and where other than statutory words are used, they must be equivalent to or of more extensive signification than the statutory words. (Clark's Crim. Laws of Texas, 420, and note; Lantzner v. The State, 19 Texas Ct. App., 320; Kerry v. The State, 17 Texas Ct. App., 180; Tynes v. The State, 17 Texas Ct. App., 123.)

In his charge to the jury, the learned judge instructed them that they would find the defendants guilty if either of the two statutory modes was proven. In this the instruction was erroneous, because there was no sufficient allegation as to the second mode of committing the offense—that is, by "habitual carnal intercourse without living together." Instructions are erroneous which warrant the jury to convict on proof of acts not alleged in the indictment. (Powell v. The State, 12 Texas Ct. App., 238; Randle v. The State, 12 Texas Ct. App., 250; Burns v. The State, 12 Texas Ct. App., 394.)

Again, upon the only valid offense charged in the indictment, viz., the unlawful living together and carnal intercourse, the evidence is wholly insufficient, and does not sustain the allegation nor the judgment of conviction. There is no proof that the parties "*lived together*;" on the contrary, the proof was that they did not live together, and consequently there was a material

Syllabus.

variance between the proofs and the allegations upon which the conviction was had.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered November 23, 1887.

No. 2645.

GREEN LYNCH v. THE STATE.

1. **MURDER—EVIDENCE.—DECLARATIONS** or acts of a defendant in his own favor, unless part of the *res gestæ* or of a confession offered by the prosecution, are not admissible for the defense. Under this well established rule the trial court did not err, in this case, in refusing to permit the defendant to prove his statements and declarations made fifteen or twenty minutes after the homicide, and after he had gone twelve hundred yards from the place of the killing.
2. **SAME—CHARGE OF THE COURT.**—The evidence in this case disclosed that, at the time of the homicide, the defendant was on his way to the post office in the town of E. As tending to show that his meeting with the deceased was unpremeditated and accidental, the defendant proposed to prove by a witness that, on the Saturday before the Monday on which the homicide occurred, he told the witness that he would meet him at the post office in E. on the said Monday. The trial court excluded the proposed testimony, and charged the jury as follows: "The defendant had the right to go to the post office or any other place he desired to go for a lawful purpose; but if he started to go to or by the house of the deceased merely to get an excuse to kill him, or with the intention of seeking or getting into a fatal rencontre with the deceased, and thus got into the difficulty, then the defendant can not justify the homicide, even though his life was put in peril." *Held*, that waiving the question of the correctness of the ruling of the court in excluding the proposed evidence, the charge of the court was radical error, because it was predicated upon no evidence whatever showing a hostile intention of the defendant in going to or by the house of the deceased. The rule is that, "however correct a principle of law may be in the abstract, it is error to give it in charge if there is a total want of evidence to support the phase of case to which it is applied."
3. **SAME—THREATS—STATUTE CONSTRUED.**—Article 608 of the Penal Code provides that threats afford no justification for homicide, "unless it be shown that, at the time of the homicide, the person killed, by some act then done, manifested an intention to execute the threat so made." *Held*, that under a proper construction of this statute, the act done

24	350
33	536
34	482

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must manifest the *immediate* intention to execute the threat so made. It was not error, therefore, that, in his charge upon this subject, the trial judge interpolated the word "immediate" to qualify "intention." See the opinion in extenso on the question.

APPEAL from the District Court of Fannin. Tried below before the Hon. D. H. Scott.

This conviction was in the second degree for the murder of A. J. Guess, in Fannin County, on the twenty-fifth day of April, 1887. A term of seven years in the penitentiary was the penalty assessed against the appellant.

Mrs. S. J. Guess was the first witness for the State. She testified that she was the widow of A. J. Guess, who died in Fannin county, Texas, on the evening of April 25, 1887, from the effects of a gunshot wound inflicted by the defendant. The shooting occurred at about six o'clock p. m. at a point about forty yards from the deceased's house, which was situated in Fannin county, about eighteen miles northeast of Bonham, and about two and a half miles south of Elwood. The witness and L. Crutchfield were the only persons present at the time of the shooting. The witness was in her house, but witnessed the tragedy through a large opening in the wall, used for a window. When witness first observed her husband, just before the shooting, he was just turning from the field gate, leading his mare with the plow harness still on. The gate was closed. Crutchfield was sitting in a wagon holding the reins. The wagon was standing still. Defendant was standing on the ground near the wagon. Deceased started to the gate, leading his mare, and walking slowly. He passed the wagon on the east side. Defendant went to the west side of the wagon, got his gun and walked to the head of the team, where he stood for a moment, holding the gun in a shooting attitude. Within the moment the deceased appeared at the front of the wagon, leading his mare, when the defendant fired both barrels of his shot gun, and deceased fell. Deceased was standing perfectly still, holding the reins of his mare and facing the defendant when the fatal shots were fired, but was making no demonstrations at defendant. As soon as he fell the witness ran to him and caught his head in her arms. He gasped once or twice, but expired without speaking. Witness turned to the defendant, who was still standing near with his gun in his hand, and said to him: "Oh! Uncle Green, what did you do this for?"

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Defendant made no reply, but got into the wagon and drove back through the field, the way that he had come.

If anything was said by either of the parties at the time of the shooting, the witness did not hear it. Crutchfield did not interfere, or make any attempt to prevent the shooting. The deceased was totally unarmed at the time of the shooting, except that he had an old pocket knife which, after his death, was found in his pocket, closed. The shots took effect in the left breast, in the region of the heart, and made a wound about two inches in diameter. Deceased had been plowing in his field. The gate through which he came opened out of his field, and was his only means of getting out of the field to go to his house. It was about the usual time of quitting work and coming home. The road on which the defendant and Crutchfield were traveling led through the gate at which the killing occurred, across the field, and out at the south gate. When the shooting occurred, the wagon was about ten feet from the gate. The field in which the killing occurred belonged to the witness's father, A. R. McRae, who located the road across it, with the gates mentioned, for the convenience of his neighbors. The deceased had rented, and was working that part of the said field on which the killing occurred. Deceased and defendant had a difficulty about two years before the killing. That difficulty occurred in the Indian Nation. The cause of it was a business transaction entered into by witness during the absence, and without the knowledge or consent of the deceased. She bought a stove in the said Nation, and the defendant became her surety on the purchase. When her husband learned of the purchase he disapproved of it, because he was unable to pay for it. Shortly after this, deceased and witness started back to Texas, and defendant, who then as now, lived in the Nation, followed them, and made deceased pay for the stove. He also telegraphed to Fannin county, and had deceased arrested about a fifty dollar debt due him by deceased. These transactions gave rise to ill-feeling between deceased and defendant. Defendant lived in the Nation at the time of the killing. Deceased had lived in the Nation, but had resided in Fannin county for two years at the time of his death. The deceased's left hand, in which when he was shot he was holding his mare's bridle, was crippled and could not be straightened. His mare broke loose when the gun fired. Defendant said nothing after firing the fatal shot, but put his gun in the wagon and started to unhitch the team. Crutchfield told him that he could

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take the wagon as easily as he could the mule team. Defendant then got into the wagon and drove off.

On or about the thirteenth day of April, about twelve days before the homicide, witness heard of the defendant's arrival at her father's house, and wrote him a note warning him not to come to deceased's house, as deceased was still angry with him, and had, on the day that witness wrote the note, taken his gun with him to the field, remarking that defendant might come to the field, and that, if he did, he, deceased, might hurt him. When defendant first came to the neighborhood, and to witness's father's house, deceased said that if he came on his place one of them would get hurt. For two days afterwards deceased took his gun with him to the field, but carried it no other days, and witness thought the crisis was passed. Witness never heard the deceased threaten to hurt the defendant except in the event the defendant should come on his place. When the killing occurred, the deceased's gun was in his house, hanging on the rack. There was a road around and outside of the field, which led to Elwood, but the road through the field was the nearest, and the one most generally traveled by neighbors going to Elwood. Witness did not know of her own knowledge that defendant had ill-feelings toward deceased when they met on the fatal evening, but she knew that deceased was still angry with defendant for the treatment he received at defendant's hands two years before.

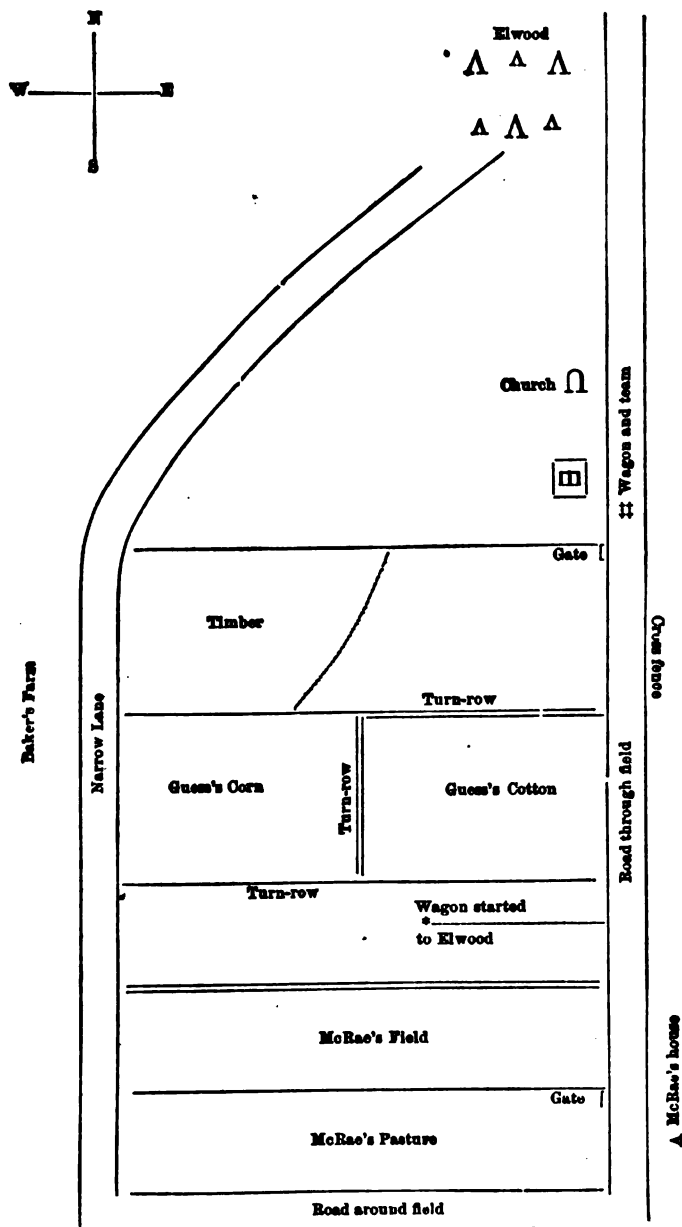
W. F. Castlebury testified, for the State that the defendant came to A. R. McRae's house about a week before the homicide. On the Thursday before the fatal Monday, he, defendant, bought a double barreled shot gun from the witness. At the time of the purchase he said that he wanted the gun to hunt squirrels. He did not say a word about the deceased. There was a road to Elwood which ran outside and around the field in which the killing occurred, but the road through the field was the shorter, and was generally traveled by the neighbors.

A. R. McRae testified, for the State, that the deceased was his son-in-law, and the defendant his brother-in-law. The latter, who lived in the Indian Nation, came to the witness's house on the Tuesday or Wednesday before the fatal Monday. On the Thursday after he came he bought a double barreled shot gun. He sometimes carried the gun when he left witness's house, and sometimes he did not. The witness had been planting cotton, using Crabtree's planter, which he promised to send home on the fatal day. While Mr. Hardy was hitching the team to the

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wagon to take the planter home, the defendant, armed with his gun, and L. Crutchfield came to the field from witness's house. Defendant and Crutchfield got into the wagon with the planter, and started over the field road towards the deceased's house. Defendant had a letter which he said he was going to mail. This was about five o'clock p. m. Some time after the wagon left, the witness heard two reports of a gun fired in rapid succession, and knew at once what had happened. Defendant got back to witness's house with the wagon, about dusk. The distance between the houses of the witness and the deceased was about twelve hundred yards. From the point in the field where defendant started with the wagon, to deceased's house, the distance was about nine hundred yards. Defendant reached witness's house about fifteen or twenty minutes after witness heard the reports of the gun, and immediately sent for officers, to whom he surrendered. The road through the field in which the killing occurred was left open by the witness for the convenience of his family and neighbors in going to Elwood, and no part of the said road was rented to the deceased. The road around the field was longer than the field road, and passed by the point in the field where the deceased was said to have been plowing just before the killing. Defendant lived in the Nation, but came to the neighborhood for medical treatment by Doctor Bates of Bonham. He went to Bonham to see Doctor Bates before the killing, but, finding Doctor Bates absent, he came back to the witness's house. After the killing the defendant received a postal card from Doctor Bates, stating when he would return to Bonham. At the time of the killing the defendant was expecting a letter from his wife, who was at his home in the Nation. The Red river was but two miles from the place of killing, the intervening country, with which the defendant was well acquainted, being heavily timbered. Defendant could easily have effected his escape into the Nation after the killing. Defendant was a feeble, sickly man, forty-five or fifty years old. Deceased was a strong man, in good health, thirty or thirty-five years old. The deceased's corn rows ran to the fence on the west side of witness's field, along which the outside road led to Elwood. Deceased was plowing his corn on the day of the killing. The plat here introduced in evidence was made by the the witness, and was correct. It is as follows:

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$2\frac{1}{2}$ miles from Elwood to McRae's.
 1200 yards from McRae's to Guess's house.
 900 yards from * in field to Guess's house.

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The State's evidence closing with the plat, the defendant introduced L. Crutchfield as his first witness. Mr. Crutchfield testified that he was present and witnessed the homicide. The witness was in a wagon taking home Mr. Crabtree's cotton planter, which Mr. McRae had borrowed. Defendant was in the wagon with him, on his way to the Elwood post office. Elwood was on the road to Crabtree's. The road traveled by witness passed the house of the deceased at a point about forty yards from the gate that led out of the field. During the day the witness had been at work in the field south of the deceased's land, and started to Crabtree's from the place where he had been at work, which was about one-third of the distance from McRae's house to the deceased's house. While passing through the field, and when they reached a point about one hundred yards distant from the gate at deceased's house, the witness and the defendant saw the deceased plowing in his corn field. He was then coming over a hill. He came to the end of his row, turned and plowed about fifteen yards, when he stopped and hurriedly unhitched his plow mare, led the animal to a convenient stump, mounted her and ran her to the turn row leading to the road traveled by witness and defendant. He followed the wagon in a fast gallop. When the deceased mounted his mare from the stump, the witness remarked to defendant: "He is after you!" The defendant replied: "Drive up, and lets get out of the way." Witness whipped the mules into a fast trot, which he kept up until the gate was reached. Defendant got out of the wagon and opened the gate. Witness drove the wagon through and defendant closed the gate. At that instant the deceased galloped up, dismounted, opened the gate, and led his mare through. Defendant said to deceased: "Hello, Jack! What are you in such a hurry for?" Deceased replied: "If I get my gun, I will show you what I am in a hurry for." Defendant then came to the west side of the wagon and took his gun out. Deceased then started around the west side of the wagon, when defendant presented his gun, and said to him: "Sir! wilt; you have been following me, and have threatened and tried to kill me as often as I will allow you." Deceased then started back around the east side of the wagon, still leading his mare, and again said: "If I can get my gun I will kill you." Defendant then walked to the head of the team on the west side and stopped, and, when deceased got opposite to him on the east side of the wagon, defendant raised his gun and shouted "stop!"

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Deceased replied: "Shoot, dogon you!" and defendant fired. Defendant's motion, raising the gun, frightened the mules attached to the wagon, and witness did not see either of the parties at the moment that the shots were fired. Up to that time witness had been watching deceased, and up to the moment that the mules became frightened, the deceased did not stop walking and leading his mare. Witness thought the deceased was walking, and not standing, when the fatal shots were fired. Witness was on the wagon on the side next to the defendant when the gun was fired. If two shots were fired, they were fired too near together for witness to distinguished them apart.

As soon as the gun was fired the deceased fell, and Mrs. Guess came running from the house to the prostrate form of her husband. She took his head in her lap and said to defendant: "Oh, Uncle Green, why did you do this?" Defendant made no reply, but put his gun in the wagon and began unhitching the mules. Witness told him that he could take the wagon back as easily as he could the mules, when he got into the wagon and drove back over the same road to McRae's house. Witness remained at the house of the deceased, and saw the deceased's rifle in the gun rack in the house. The deceased's ground was in the north part of McRae's field. Witness had been at work in the south part of McRae's field. The shortest route to Elwood from that point was over the road traveled by witness and defendant, and that road missed the defendant's corn field, in which he was plowing, about one hundred and fifty yards. The longer route, over the outside road and lane, would lead immediately by the west end of deceased's corn rows. On the next day after the defendant reached McRae's house, the witness saw the deceased and told him that defendant had arrived. Deceased, who was then in the field, replied that he knew it. Witness then said something about getting defendant, who was an expert plowman, to experiment with a certain plow. Deceased pointed to his gun standing against the fence, and said: "That is the plow he will plow with, the God d—d son of a bitch, if he comes in this field." In the same connection, deceased said that defendant had treated him very badly some time before that. On the Wednesday or Thursday before the fatal Monday the deceased came to the field where witness and Hardy were plowing, and said that he intended to kill defendant if he ever got in gun shot of him; that defendant treated him meanly in the Nation; that defendant induced his wife to buy a stove in the Nation when he was not able

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to pay for it; that, when he went to leave the Nation, defendant followed him with officers and made him pay for it. Witness, in reply, told deceased that he had better be trying to make his peace with his Maker than trying to kill his fellow man. At another time, while defendant was in the field with witness's team, deceased said that he had a mind to go and drive him out of the field. At another time, deceased remarked that defendant would come into that field and get hurt; and at another time he said that "some of these days somebody will go hunting and come up missing." Witness communicated deceased's various threats to the defendant. He knew deceased to be a man likely to execute a threat. Defendant had a letter with him at the time of the killing, to be delivered at Elwood, and was then expecting a letter from his wife.

On his cross examination the witness said that when he left McRae's house to go to the field and take the planter home, the defendant, taking his gun, went with him. When they got to the field they found the boy Hardy hitching the mules to the wagon in which the planter was to be hauled home. Deceased could be seen plowing in his field from the point where witness and defendant started with the wagon. Defendant had worked a while that day in McRae's field. When the deceased passed through the gate, just before the shooting, he did not go at once around the east side of the wagon, but started around the west side, on which side the defendant then was. The witness was related to both the defendant and the deceased, but, not regarding their quarrel as any business of his, he said nothing to either of them at the time of the fatal meeting. Witness made no effort to prevent the shooting, nor did he warn deceased when defendant went to take his gun out of the wagon. When witness last saw deceased before the shooting, which was an instant before the shot or shots were fired, he was slowly passing the east side of the wagon, leading his mare. He had the bridle reins in both hands behind him.

Will Hardy testified, for the defense, that he was in the field with Crutchfield when Crutchfield told deceased that defendant had come to McRae's, and that he was going to get the defendant to try a certain plow. Deceased pointed to his gun, and said: "That is the kind of plow he will plow with if he comes in this field." In the same connection he threatened to kill defendant, and said that somebody would "go hunting some time, and get game;" and at the same time he related the stove transaction in

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the Indian Nation as related by Crutchfield, and said further that, just after the stove transaction, defendant telegraphed a man named Bragg, and had Bragg and officers to collect fifty dollars from him, deceased, which he did not owe. He closed his outburst with the statement that defendant was "a d—d son of a bitch, and if he ever comes in this field, and I can look down a gun barrel, I will pull a trigger." On the Thursday before the fatal Monday, deceased came to the field and told witness and Crutchfield that he would kill defendant if he ever got a chance, and that, if he ever got a "drive" at defendant, he would "get him" if he had to run him into McRae's house, and that he would kill defendant if he hung for it ten minutes later. Witness told defendant of all those threats, and heard Crutchfield tell him the same. On the day before the killing, the witness, on his way to singing, stopped at the deceased's house, and found the deceased alone. He remained there some time with him. During that time deceased said to witness: "Confidentially, between me, you and the gate post, if Lynch ever lays the gap down so I can save myself I will kill him; and if ever I come up with him it will be run, hang or fight." Witness did not report this last statement. Deceased had his gun in the field during two days after defendant came to McRae's. Witness was friendly to both defendant and deceased.

Cross examined, the witness said that while he was hitching up his team to take the planter home, on the fatal evening, the defendant, armed with his gun, and Crutchfield came to the field, and defendant asked witness to let Crutchfield go with the planter, to which witness readily agreed. At that time deceased could be seen planting in his corn field, and he could have seen the parties at the planter. When, a short time later, witness heard the shots, he remarked: "Lynch and Guess have got into it at last."

W. H. Turner testified, for the defense, that, about two years before this trial, he sold a rifle to the deceased. Deceased at that time said that he wanted the gun to kill a man named Green Lynch, who was his wife's uncle, and who had recently treated him badly about a stove in the Nation.

Mrs. Mary McRae, the defendant's sister, testified, in his behalf, that defendant came to Texas from the Indian Nation just before the killing, to be treated by Doctor Bates, of Bonham. His health had been bad for two or three years, and witness wrote him to come to Texas for treatment. When defendant first

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went to Bonham he was informed that Doctor Bates was absent. A few days before the killing he wrote to Bonham to ascertain whether the Doctor had yet got back. Four or five days after the killing a postal card addressed to "Green Lynch, Elwood, Fannin County, Texas," was received at Elwood. It read as follows: "Bonham, Texas, April 28, 1887. Dear Sir:—Yours of recent date received. My father, Dr. Bates, at present is at Aubry, Denton county, Texas, but will be at home next Monday, at one-thirty p. m. We would be glad to have you call. Yours, etc., Doctor E. M. Bates."

Five witnesses, including A. R. McRae, testified that they had known the defendant from twenty to thirty years, and that he had always borne a good reputation for peace and quietude, and as a law abiding, inoffensive citizen. A. R. McRae testified that deceased's reputation was just the reverse.

The defense closed.

Mrs. Guess testified, for the State, in rebuttal, that it was not true that after deceased passed through the gate he started around the west side of the wagon, towards defendant. He was walking along the east side, leading his mare, when he was shot.

One witness for the State testified that the "outside" road from McRae's to Elwood was a traveled road, and not more than two hundred or three hundred yards longer than the road through the field. Several witnesses testified that deceased's reputation for peace and quietude was good.

The excluded testimony referred to in the opinion and in the first head note was that the defendant, when he returned to McRae's immediately after the killing, told McRae that he, defendant, had shot Guess, and regretted that he had done so, but that he had to do so in order to prevent Guess from killing him, and that he did the shooting in self defense.

The motion for a new trial raised the questions discussed in the opinion,

Lusk & Thurmond, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. This appeal is from a judgment of conviction for murder of the second degree for the killing of one A. J. Guess, whose wife was a niece of this appellant.

Opinion of the court.

There are several bills of exceptions as well as assignments of error presented in the record, which attack certain rulings of the trial court upon questions of evidence and certain portions of the charge given the jury, as also the refusal to give certain requested instructions asked for defendant. We propose to notice only such matters complained of as are considered of moment on this appeal.

I. Defendant complains that the court erred in refusing to permit him to prove his own statements and declarations with regard to the homicide, made within fifteen or twenty minutes after the killing, and after he had gone in a wagon some twelve hundred yards from the place of the killing. This identical question occurred in Stephens's case, 20 Texas Court of Appeals, 255, and it was there held that "declarations of a defendant concerning the crime charged against him, made ten or fifteen minutes after the commission of the same, and after he had gone a distance of four or five hundred yards from the place of the homicide, can not be treated as *res gestæ*, and are, therefore, not admissible in his behalf." "Declarations or acts of a defendant in his own favor, unless part of the *res gestæ* or of a confession offered by the prosecution, are not admissible for the defense." (Walker v. The State, 13 Texas Ct. App., 619.)

II. For the purpose of showing that the meeting with deceased was unpremeditated and accidental, defendant proposed to prove that, on the Saturday before the Monday when the killing occurred, he had told the proposed witness, Rogers, that he would be at the postoffice at Elwood on Monday evening to get his mail. This evidence was claimed to be admissible in connection with other evidence which he had introduced, showing that he was on his way to Elwood at the time the difficulty occurred, and tended also to establish that fact. Whatever may have been the theory of the State at the beginning of the trial with regard to this matter, we are of opinion that the evidence upon that point is positive and uncontradicted, to the effect that defendant had started to and was on his way to the Elwood post office, that he was going for his mail, that he was traveling the accustomed and most direct route; and there is no testimony that he had any purpose to seek and bring on a difficulty with deceased. True, he had a double barreled gun with him. But this he had a right to carry, and, if he was carrying it on account of the threats deceased had made against his life, this did not lessen but only emphasized the right. He did not go

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out of his road or way to meet deceased. On the contrary, when he found that deceased had unhitched his horse from the plow and was rapidly following the wagon in which he was riding, he urges the driver to go faster "to get out of his way," and they do get to the gate, close it, and are outside the field when the deceased overtakes them.

Now, if under these circumstances it was still an open question as to whether he was going to the post office or not, then the excluded evidence was perhaps material and admissible as an additional fact going to prove it. If it was not an open or disputed question, the evidence was immaterial. In our opinion enough has been shown to establish its immateriality, and if this had been the view of the learned trial judge his ruling would have been correct. Such, however, does not appear to have been the case, because we find in the fifteenth paragraph of his charge, which is made a special ground for exception by the defendant, that the jury are instructed that "the defendant had the right to go to the post office, or any other place he desired to go for a lawful purpose, *but if* he started to or by the house of the deceased merely to get an excuse to kill him, or with the intention of seeking or getting into a fatal rencontre with the deceased, and thus got into the difficulty, then the defendant can not justify the homicide even though his life was put in peril."

With the testimony as disclosed in the record before us, there was no doubt as to his purpose and intention, or that it was a lawful one; he was, as all the witnesses who testify on that point say, going to the post office. If this be so, then this instruction, in so far as it questioned his intention and purpose, was not warranted by evidence, and was calculated to prejudice him with the jury by impressing them with the idea that, in the opinion of the court, there was serious doubt upon the subject. To our minds, one of two things must be apparent—either that the evidence excluded was material and should have been admitted if this instruction was warranted, or the instruction was itself unwarranted, because there was no disputable matter upon which to predicate it. In either aspect of the case the error is both important and serious. With the lights before us, we would say the ruling upon the evidence was correct, and the instruction erroneous. "However correct a principle of law may be in the abstract, it is error to give it in charge where there is a total want of evidence to support the phase of case to which it is ap-

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plied." (Conn v. The State, 11 Texas Ct. App., 390.) "If the court assumes and charges on a theory not raised or indicated by the evidence, it is radical error and fatal to a conviction." (Ross v. The State, 10 Texas Ct. App., 455; Taylor v. The State, 13 Texas Ct. App., 184; Hardin v. The State, Id., 192; Stewart v. The State, 15 Texas Ct. App., 598.) A charge should be confined to the facts in evidence. (Boddy v. The State, 14 Texas Ct. App., 528; Mayfield v. The State, 23 Texas Ct. App., 645.)

III. A most vigorous attack is made, in the able brief of counsel for defendant, upon that portion of the charge of the court relative to threats made by deceased against defendant. It is insisted that whilst, in the twelfth paragraph, the court correctly announced the law as declared in article 608 of our Penal Code, that it was error in paragraphs thirteen and fourteen to interpolate the word "*immediate*," and thereby qualify the word *intention* as used in the statute. It is declared by the statute that threats afford no justification for homicide, "unless it be shown that, at the time of the homicide, the person killed, by some act then done, manifested an intention to execute the threat so made." The jury were charged by the court that threats would afford no justification, unless the deceased "manifested an intention by some act done at the time showing an *immediate* intention to execute the threats." •

Applied to the facts directly attendant upon the killing, it is contended that the use of the word "*immediate*" was not only unauthorized but deleterious in the extreme. Deceased was unarmed. He had dismounted to open the gate, had come through and was leading his horse, and defendant, who was still upon the ground, accosted him: "Hello, Jack; what are you in such a hurry for?" The reply was: "If I get my gun I will show you what I am in a hurry for." His gun was at his house, some forty or fifty yards distant. Defendant went to the west side of the wagon and took out his gun, and, as deceased started round the left side of the wagon, defendant presented his gun at him and said: "Sir, wilt! You have been following me, and threatened and tried to kill me as often as I will allow you to." Deceased turned and went round the east side of the wagon, still leading the horse, and said again: "If I get my gun I will kill you." Defendant walked to the head of the mules to the wagon, on the left side, and stopped, and when the deceased came opposite from the east side, defendant said: "Hold up," raised and presented his gun, and, as deceased said: "Shoot, dog on you," he fired

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both barrels in quick succession, killing deceased instantly. Previous and deadly threats on the part of deceased were proven, and also the fact that he was a violent man and one likely to execute his threats.

It was the theory of the defense that deceased had seen defendant passing in the wagon, had followed him rapidly, and, when shot, was going to his house, some forty or fifty yards distant, to get his gun and with it execute his threats; and that defendant, in his legitimate right of self defense, had the right then and there to anticipate and shoot him. A special instruction requested for defendant, and which was refused by the court, embraced this theory, as follows, viz:

"If you believe from the evidence that, at the time of the killing, Guess was advancing towards defendant and toward's his (Guess's) house, with the avowed intention to get his gun and attack defendant, and take his life or do him some serious bodily injury, and if you further believe that the facts and circumstances in evidence were such as to create in the mind of defendant a reasonable belief and apprehension that such was the intention of Guess, * * then defendant might act in advance and make the attack upon Guess. Nor was it necessary that there should in fact be real danger to defendant at the time of the killing, provided the facts and circumstances in evidence were such as to produce in the mind of defendant a reasonable fear or expectation of death or serious bodily injury."

As before stated, the language of our statute (Penal Code, art. 608) is that threats afford no justification "unless it be shown that at the time of the homicide the person killed, by some act then done, manifested an intention to execute the threat so made." In Penland's case (19 Texas Ct. App., 365) the doctrine of self defense enunciated by our Supreme Court in *Lander v. The State*, 12 Texas, 462, is quoted approvingly, as follows: "The belief that a person designs to kill me will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or at least, is in apparent situation to do so, and thereby induces me reasonably to think that he intends to do it *immediately* (citing 4 Iredell, N. C., 409). No contingent necessity will avail." In Weaver's case (19 Texas Ct. App. 547), speaking of the doctrine of self defense, it is said that self defense "is a defensive, not an offensive, act," and that "to justify the destruction of human life, the danger must not be problematical and remote, but (apparently) evident and *immediate*."

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And, again: "The necessities of self defense are limited to the *immediate* resistance of (apparent) aggression, and the apprehension must have been excited by (acts evincing) an actual assault." "The danger to be averted must be apparently *immediate*, pressing, imminent and unavoidable." (See *Hinton v. The State*, 24 Texas, 454; *Holt v. The State*, 9 Texas Ct. App., 666.)

In *Jones v. The State*, 76 Alabama, 8, it is held that, to "establish the plea of self defense in a case of homicide, the defendant must have entertained at the time an honest belief in the existence of a present necessity on his part to kill in order to save his own life, or to prevent the infliction of grievous bodily harm, and the circumstances must have been such as to impress the mind of a reasonable man, under the same state of facts, with a belief of such imminent peril and urgent necessity."

In *The People v. Westlake*, 62 California, 303, the rule announced is that "past threats or conduct of the deceased, how violent soever, will not excuse a homicide without sufficient present demonstration to authorize the belief that the deadly purpose then exists, and the fear that it will then be executed." (See also *Id.*, 204.) And in *The People v. Tompkin*, 62 California, 468, it is held that there must be such a demonstration of an immediate intention to execute the threat as to induce a reasonable belief that the party threatened will lose his life or suffer serious bodily injury unless he immediately defends himself against the attack of his adversary." In *The State v. Horne*, 9 Kansas, 119, it is said: "There must not only be reasonable ground to believe, but the purpose to execute the design must be accompanied by some attempt to execute it, or the person must at least be in an apparent situation to do so, and so induce a reasonable belief that he intends to do it immediately." (Same case, 1 Crim. Law Rep., Green, 718; see also *The State v. Clifford*, 5 Crim. Law Mag., 242.)

We are of opinion that a proper construction of the language of our statute (Penal Code, article 608) is that the act done by deceased manifesting his intention to execute his threats must be such an one as shows an *immediate* intention—"at the time"—"*then done*," and not an intention dependent upon some other contingency. Deceased's language showed that he had no such immediate intention, but he told defendant to wait until he got his gun, which was in his house, forty or fifty yards away. In the light of the authorities cited, and our view of the proper construction of the statute, we do not think the charge of the court

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defective in the particular complained of; and, judged by the same rules of law, we think it must be apparent that the special requested instruction was not the law, and that, consequently, there was no error in refusing it.

Other questions presented on this appeal are of comparatively but little moment, and will not be discussed. Because the charge of the court in the fifteenth paragraph, as is previously shown, prejudicially instructed the jury as to a phase of the case unwarranted by the evidence, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered November 23, 1887.

No. 2728.

GEORGE CARROLL v. THE STATE.

1. **ASSAULT.**—To constitute an assault under the law of this State there must be the use of some unlawful violence upon the person of another, with intent to injure him or her, or some threatening gesture, showing in itself or by words accompanying it an immediate intention to commit a battery.
2. **ASSAULT TO RAPE** is constituted by the existence of facts which bring the offense within the definition of an assault, coupled with an intention to commit rape; and such an assault can only be committed by means of force or attempted force.
3. **SAME—FACT CASE.**—See the opinion and the statement of the case for evidence held insufficient to support a conviction for assault with intent to commit rape, because insufficient to show the use of force or attempted force.

APPEAL from the District Court of Freestone. Tried below before the Hon. Sam R. Frost.

The conviction in this case was for an assault with intent to rape Mrs. Bettie Livingstone, and the penalty assessed was a term of two years in the penitentiary.

Mrs. Livingstone testified, for the State, in substance, that, between three and four o'clock on the morning alleged in the indictment, she was awakened by the sound of some one step-

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ping across the floor of her room. She stretched her hand out and touched some one, who called to her, "Miss Bettie." The witness then screamed, and the person fled through the front door, closing it. Witness then called to a neighbor, Mrs. Calvery, who soon came. Witness did not see the person who entered her room, but thought that she recognized the voice of the defendant, with which she was familiar. Defendant was the only male acquaintance of the witness who called her "Miss Bettie." The person who entered witness's house did not touch witness.

The third witness for the State testified that he left the town of Oakwoods late on the day before the alleged outrage to go to his home near Mrs. Livingstone's residence. The defendant was on the road and was too drunk to ride his horse, and witness placed him in his own buggy and took defendant to his, witness's, brother's house, and left him in the buggy. Afterward witness told him that his horse was hitched near by, and that when he had sufficiently slept off his drunkenness he had better go home. About three o'clock in the morning the defendant got up and rode off. Soon after he left, witness heard screaming in the direction of Mrs. Livingstone's, but paid no attention to it, thinking that some negro was whipping his wife. On the morrow he heard what had transpired at Mrs. Livingstone's. With other witnesses he took the trail of the defendant's horse and followed it to a point where the rider dismounted and took off his shoes and socks. Thence he followed the barefoot track to Mrs. Livingstone's house, and back in a roundabout direction to the horse, and trailed the horse tracks from that point, in a roundabout direction, to or near the defendant's. Two other witnesses testified substantially the same with regard to the tracks of the horse and the barefooted tracks of the man.

The defense offered no evidence, but in the motion for new trial raised the questions discussed in the opinion.

Bell & Steele, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE: An assault with intent to commit rape is constituted by the existence of facts which bring the offense within the definition of an assault, coupled with an intention to commit rape. (Penal Code, art. 506.)

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To constitute an assault there must be the use of some unlawful violence upon the person of another, with intent to injure him or her, or some threatening gesture showing itself, or by words accompanying it, an immediate intention to commit a battery. (Penal Code, art. 484; *Jones v. The State*, 18 Texas Ct. App., 485.)

Assault with intent to commit rape can only be committed by means of *force* or attempted force. (*Burney v. The State*, 21 Texas Ct. App., 565; *Taylor v. The State*, 22 Texas Ct. App., 529; *Milton v. The State*, 23 Texas Ct. App., 204.) There must be some sort of *force* or attempted force used, or the offense is not made out.

In *Dibrell's* case the defendant was pulling the bed clothes off the injured female when she awoke and gave the alarm, and this court held in that case that the force was sufficiently proven. (3 Texas Ct. App., 74.) In *Johnson's* case (18 Texas Ct. App., 565), the evidence was held insufficient, though the prosecutrix swore defendant placed his hands upon her; and in *Peterson's* case (14 Texas Ct. App., 162), whilst it was held that the violence used was sufficient to constitute aggravated assault, it did not show an intent to rape. (See *Hamilton v. The State*, 11 Texas Ct. App., 116; also, *Sandford v. The State*, 12 Texas Ct. App., 196; *House v. The State*, 9 Texas Ct. App., 53.)

In the case before us, even if we concede that appellant was the party in Mrs. Livingstone's room when she awoke and screamed, still that does not sustain the conviction, because he used no force or attempted force, no threatening gesture, but simply called her given name, and, when she screamed, fled.

Because the facts are insufficient to establish an assault with intent to rape, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered November 23, 1887.

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No. 2583.

CAL. ROY v. THE STATE.

1. **THEFT—CHARGE OF THE COURT—PURCHASE OF THE ANIMAL** was the defense interposed to the prosecution for the theft of the same, and, the defendant having produced evidence tending to establish that defense, he was entitled to an affirmative charge instructing the jury to the effect that if they believed from the evidence that the defendant purchased the animal, or if, from the evidence as to the purchase, they entertained a reasonable doubt that he stole the animal, they must acquit him of the charge of theft. The refusal of a special charge embodying the rule as stated was error.
2. **SAME—PRACTICE—NEW TRIAL.**—See the statement of the case for the substance of evidence set out in a motion for new trial, which, though not strictly newly discovered, in the light of the evidence on the trial entitled the defendant to a new trial.

APPEAL from the District Court of Travis. Tried below before the Hon. Eugene Williams on exchange.

The conviction in this case was for the theft of a horse, the property of B. F. Cage, and the penalty assessed against the appellant was a term of ten years in the penitentiary.

B. F. Cage was the first witness for the State. He testified, in substance, that some time in the month of April, 1886, he lost his certain mare from her range in Blanco county, Texas. The animal referred to was about fourteen and a half hands high, about four years old, and of a dirty black or blue dun color, such color as is called "grueyer" by the Mexicans. She was unbranded, and was the property of the witness and was in his range possession when taken. Witness had never seen the mare since. He bought her as a colt, and her mother, as estrays, at an estray sale in the town of Blanco. He owned the mother for a short time, and sold her to a Mexican named Gregorio Lopez. The colt (the alleged stolen animal) followed the mother to the range, and remained on the range until she was stolen. The Mexican, Lopez, knew the animal well—better, in fact, than witness did. Witness last saw his animal in March or April, 1886. He ascertained positively that she was missing about the last of June. Late in April a negro told witness that he thought

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the said mare was in foal, but witness could not tell it from her appearance. Witness did not remember that the animal described had any white about her. She was unbroken, and had never been ridden or worked when she disappeared. When, late in June or early in July, Sheriff Jackson and Gregorio Lopez started to east Texas to look for some of Lopez's missing horses, witness authorized them to sell his said mare, if they should find and recover her. On their return, they reported that they found witness's animal in Shelby county, Texas, and sold her, and Jackson paid witness the money for which he had sold her. Mr. Jackson officiated at the estray sale of the said mare and her mother, and knew both of the animals. Witness, upon reflection, was certain that his said mare had no white about her.

Gregorio Lopez testified, for the State, that about June 15, 1886, he missed nine head of horses from his range in Blanco county and instituted a search for them. He went to the defendant's ranch and asked him if he had seen any of the horses, which the witness described. Defendant looked at the brand on witness's horse and told witness that he need look no further, for that he, defendant, had shipped them to Eastern Texas. B. F. Cage's four year old "grueyer" mare ran with the witness's horses, and had run with them for over two years. Witness knew that animal well from a colt, having owned her mother. That animal disappeared from the range at the same time that witness's animals disappeared. When witness and Sheriff Jackson, a few days later, started to East Texas to look for witness's horses, Mr. Cage authorized Jackson to sell his mare if he should find and recover her. Witness and Jackson went to Centre, in Shelby county, to which point defendant said that he shipped the horses, and at that place witness found five head of his horses, and found the Cage mare in the possession of a man named Stanley. The witness knew that animal to be the Cage mare described in the indictment. She was an unbroken, unbranded mare, four years old, about fourteen hands high, and of a color called indiscriminately "grueyer," blue dun or mouse color. She had no saddle or harness marks on her. She was still wild and unbroken when found in Shelby county. Mr. Jackson sold the mare in Shelby county, and afterward paid the purchase money to Mr. Cage. At the same time and place the witness found a stallion, which was branded with a half circle S, the half circle being under the S, which said stallion the wit-

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ness identified as the property of Mr. B. F. Stanley, and which had run on the range in Blanco county, near witness's house. Stanley, the man in Shelby from whom the said horses were recovered, said that he got them from defendant, who was a kinsman of his. The other four horses mentioned by witness as belonging to him the witness had never recovered. When witness first spoke to defendant about the horses, the latter said at once that he had shipped them to East Texas; that he had not fully paid one Bailey for the said horses, and that, if the witness would get an order from Bailey, he would pay the balance due on them to witness. Witness declined to accept the amount offered by defendant, and, besides, had no means of getting the order from Bailey. The Cage mare had no saddle marks on her when found in Eastern Texas.

Sheriff W. I. Jackson testified, for the State, that late in June or early in July, 1886, he went with Gregorio Lopez to Centre, in Shelby county, to look for and recover nine head of Lopez's horses, which were said to have been sent there and sold without authority. They found five head of the Lopez horses, and the four year old, unbroken Cage mare in the possession of one W. Stanley. Witness knew that animal well, and knew her to be the mare of B. F. Cage. People differed about the color of that animal; some called her a mouse color, some a gray, some a dirty gray, some a blue dun and others a "grueyer." However, the witness knew the animal he found in W. Stanley's possession to be Cage's mare, and sold her as Cage's, and afterward paid the purchase money to Cage. Stanley also had in possession the half circle S (B. F. Stanley) stallion, which had run on the range in Blanco county. The Cage mare, when found in Shelby county, was still wild and unbroken, was not bridle wise, and had no saddle or harness marks on her body. The Cage mare had no white feet.

Dan Mackey testified, for the State, that, in June, 1886, he lost seven head of horses from his range in Blanco county, Texas. Witness's brother-in-law, Dave Malone, went to East Texas and recovered the said horses for witness.

Dave Malone testified, for the State, that, in June, 1886, he learned that seven head of Dan Mackey's horses had been shipped from Austin, Travis county, Texas, to east Texas. Acting upon that information, he went to Austin and got Sheriff Hornsby to go with him to Shelby county, where he found the horses in the possession of defendant, who claimed that he

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bought them of one T. E. Bailey. Defendant surrendered the horses, and witness sold them in Shelby county.

M. M. Hornsby, sheriff of Travis county, testified, for the State, that, about June 19, 1886, he received a postal card from San Antonio, advertising a certain horse as having been recently stolen. Deputy Sheriff Fred Peck read the postal card, and remarked that he saw the said horse on the day before, at Roy's ranch, in the possession of the defendant. Witness then instructed Peck to go to Roy's ranch and get the horse. Peck left the office, but soon returned and reported that he had met defendant in Austin, and that defendant promised to have the horse in town on the next day. Witness directed Peck to go at once and get the horse. Peck left, and after a time he and Deputy Sheriff W. W. Hornsby returned with the defendant and the horse, and reported that defendant had a drove of twenty five or thirty head of horses across the Colorado river. The defendant claimed that he bought the horse described in the postal card and the other horses he had in his herd from one T. E. Bailey. Witness told him that, in all probability, all of the horses were stolen, and that, if he wanted to do right about them, he would hold them and permit witness to advertise them. The defendant replied: "Yes, I know they were stolen; but I bought them and have my money in them, and I am going to ship them from here to-night and get my money out of them. I have consulted my lawyer, but, if you want to take the horses away from me, you can do so." The witness declined to take the horses, preferring to take no risks in the matter, as he had no evidence that the horses were stolen. The animal described in the postal was taken from defendant, and the defendant on that night shipped the others. Witness then went to the animal inspector and got a description of all the horses shipped by defendant, and sent the description to the sheriffs of adjoining counties. A few days later, Dave Malone came to Austin and made an affidavit charging the defendant with the theft of seven head of the horses, which he described as belonging to Dan Mackey. Witness telegraphed to Shelby county to secure the arrest of defendant, and then went with Malone to Shelby county, where he found defendant under arrest, and one Stanley in possession of the bunch of horses under a claim of purchase from defendant. The bunch included all of the horses shipped from Austin by defendant, as shown by the list taken by the witness from the inspector's books. The bunch included two or

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three more animals than were included in the bills of sale from Saunders and Bailey to Bohls, exhibited by defendant; each of these extra animals was unbranded. Witness saw the alleged Cage mare in Shelby county. She was an unbroken and unbranded dun mare. He also saw the Lopez horses and the circle S stallion. Witness and Malone sold Mackey's horses, arrested defendant and brought him back to Austin. The bunch of horses mentioned by witness were shipped from Austin on or about June 19, by the defendant and one Bohls.

Fred Peck testified, for the State, substantially as did Sheriff Hornsby, up to the point when he started from the sheriff's office to go to Roy's ranch to get the horse. He then stated that he met defendant at Long's stable, and asked him where the horse was. Defendant said that he was at home, lame, and asked why witness inquired. Witness replied that he had a postal card describing him as a stolen horse, and was instructed by Sheriff Hornsby to go to the ranch and get him. Defendant replied that he had left the horse at his ranch to be forwarded the next day, and promised witness to produce him on the said next day. Witness and Will Hornsby then went back and reported to the sheriff, who ordered them to go after the horse without delay. On their way out of town they met defendant and told him that Sheriff Hornsby declined to wait, and had directed them to go and get the horse. Defendant then admitted that he had lied about the horse, and said that it was then across the river from Austin in a bunch he intended to ship on that night. Witness went across the river and got the horse from a bunch of twenty-five or thirty under herd, and in possession of defendant and one Bohls. Witness heard defendant tell Sheriff Hornsby that he, defendant, knew all of the horses were stolen, but that he had his money in them and intended to get it out.

Will Hornsby, testifying for the State, corroborated the witness Peck.

William Chapman testified, for the defense, that he lived at Dripping Springs in June, 1886. Late in May or early in June, 1886, a man named T. E. Bailey, whom witness had previously met, came to witness's house and asked the way to Roy's house. He said that he had horses to sell. He passed the night with witness, and on the next morning witness went with him to Roy's, and heard Roy agree to buy from twelve to fifteen horses from him, the horses not being present. A few days later Bailey returned to Roy's while witness was there, bringing twelve or

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fifteen horses, which he sold to Roy. Witness drew up the bill of sale—the instrument now shown him. Bailey then took the bill of sale, saying that he would take it to Mr. Morris, the justice of the peace at Cypress Mill, to acknowledge it. Witness left Bailey at the mills and went on to Llano county, to get a horse for Roy. The bill of sale included an animal in the half circle S brand, which was Stanley's brand. It was executed to Gus Bohls, Roy's partner, because Bohls was to take the horses to east Texas for sale.

L. F. Tucker testified that he lived at Dripping Springs in June, 1886, and then knew the defendant and one Bailey. He met Bailey at defendant's house during that month, when Bailey was trying to sell some horses to Roy. Roy, Bailey and witness afterwards went to a pasture in which Bailey pointed several horses out to Roy, as the ones he wanted to sell him. Witness could not now describe the said horses. The witness was familiar with the title to one animal only of those shipped by Roy to Eastern Texas. That was a brown mare sold by the witness to Roy. She was about thirteen hands high, and was unbranded; had a white star in the forehead, and her left hind foot was white, and her back was saddle marked. Roy gave witness a horse for the mare. Witness bought the mare described from Jim Cox, in May, 1886. The animal was saddle-broken and was quite gentle.

J. E. Morris, justice of the peace, testified, for the defense, that he knew T. E. Bailey. Said Bailey acknowledged, before witness, the bill of sale in evidence, in which he conveyed certain horses to Gus Bohls. Witness wrote the certificate of acknowledgment. Witness's record showed that the half circle S brand was in the said bill of sale when it was acknowledged. Witness never saw any of the horses described in the bill of sale. The defense then put in evidence a bill of sale, executed by T. E. Bailey, and witnessed by William Chapman and Aubry Clayton, purporting to convey fifteen head of horses in various brands and descriptions. It does not describe a "dirty gray, mouse-colored or dun mare, unbranded, and four years old." It described, however, an unbranded brown mare.

Mrs. Roy, the defendant's wife, testified in his behalf, that in May, 1876, L. T. Tucker or his brother, put a certain unbranded brown mare in defendant's pasture. That animal had one white foot. She remained in the pasture until the herd of horses were taken to Austin in June, for shipment, and was taken with the

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herd, and the witness supposed was shipped with them. Witness was present when Bailey brought twelve or fifteen head of horses to defendant's place, and she saw the bill of sale from Bailey to Bohls when the same was executed.

Gus Bohls testified, for the defense, that in June and July, 1886, he and defendant were partners in some horse transactions. In June of that year witness and appellant bought some horses from one Thomas or Tom Bailey. Witness was present when the bill of sale, written by Chapman, was executed by said Bailey. The bill of sale was executed in the name of the witness as the purchaser, because it was arranged at that time that the witness was to take them to the East Texas market. The price agreed upon was two hundred and forty dollars for fifteen horses, of which the witness paid Bailey forty dollars in cash, and he and defendant executed their note to Bailey for the balance of two hundred dollars. The said horses were placed in the herd which was driven to pasture near Austin, and held there for inspection. The herd was not stopped on the regular public road, but a short distance from it, in an old field, over which travelers passed when the river was up and the roads bad. They were not stopped there for the sake of secrecy, but because they could be easily held in that field by one man. Witness afterwards took the horses to Shelby county and sold them to Mr. W. Stanley. The horses were afterwards taken by officers from Shelby and Blanco counties, and by parties who claimed them. Among the horses so sold to Shelby by the witness and defendant was a little brown mare, which the witness understood was claimed to be the Cage animal. There was but one other unbranded mare in the bunch, and she was claimed and taken by Dave Malone as the mare of Dan Mackey. The animal claimed as the Cage animal was unbroken and was sold by witness to Stanley as an unbroken animal. In the prosecution of their partnership business, the defendant did the buying, but took the bills of sale in the name of the witness, who was to take the animals to market. Witness paid his own forty dollars on the Bailey purchase, and joined in the two hundred dollar note executed by defendant for the balance of the purchase money. The witness did not know, nor did he suspect, that any of the horses were stolen, nor was he present when defendant received them from Bailey. When the horses were collected, Roy drove them to witness's place in Travis county, and witness and Roy

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drove them together to Austin, and thence shipped them to Shelby county on June 19, 1886.

George Coffee testified, for the defense, that he knew the Cage mare which it is charged in the indictment was stolen by defendant, and at one time owned the mother of that animal. He last saw that mare on the range in April, 1886. He then thought, and was still of the opinion, that the said Cage mare was in foal. Witness was a horse expert, and could tell the difference between a foal-heavy and a grass-fat mare.

The motion for new trial (supported by affidavits of B. F. Cage, W. Stanley, Mrs. Roy and L. T. Tucker) alleges that since the trial and conviction of the defendant, he, the defendant, had sent to Shelby county for the animal sold by Sheriff Jackson as the Cage mare, and had her brought to Austin for the inspection of the several witnesses who testified on the trial. Stanley's affidavit alleges that the said animal was the only unbranded mare bought by the witness from W. I. Jackson, sheriff of Blanco county, Texas; that said animal was one of a number of horses purchased by affiant from said Jackson on the tenth day of July, 1886; that the said animal was a "brown two year old mare, star or white spot in the forehead, and left hind foot white," and was so described in the bill of sale executed by said Jackson to said affiant, which said bill of sale was attached to this affidavit as an exhibit. The affiant alleged that, upon the arrival of the said mare in Austin he pointed her out to B. F. Cage as the animal which Sheriff Jackson seized in Shelby county as the property of said Cage, and which he sold to the affiant as the said Cage's; that the animal so seized in Shelby county and sold to witness as the Cage mare, and the animal which affiant pointed out to said B. F. Cage, was one and the same animal. To this affidavit was attached the original bill of sale executed by W. I. Jackson to W. Stanley, which said bill of sale purported to convey to said Stanley five certain mares and horses described by color and brands, and "one brown two year old mare, star or white spot in forehead, and left hind foot white."

The affidavit of Ben. F. Cage identified the signature of W. I. Jackson to the bill of sale attached to Stanley's affidavit as genuine, and affirmed that said Cage had examined the mare claimed by Stanley to be the only unbranded animal bought by him from W. I. Jackson on July 10, and as the animal which was taken from him, the said Stanley, by said Jackson, as the property of

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said Cage and resold to him by the said Jackson, as the property of the said Cage; and the affiant declared that the said animal so pointed out to him by the said W. Stanley was not, and never had been, his property, and was not the animal which disappeared from the affiant's range possession in the spring of 1886.

The affidavit of Mrs. S. A. Roy affirmed that she had examined the animal brought back from Shelby county, and that it was the identical animal sold to the defendant by L. T. Tucker, and which was shipped by the defendant and Gus Bohls to eastern Texas, as testified by the affiant on the trial of this case. L. T. Tucker's affidavit was to the same effect.

Walton, Hill & Walton and Sheeks & Sheeks, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. Counsel for defendant requested a special instruction, as follows: "If the jury believe, from the evidence, that the defendant purchased or traded for the animal alleged to have been stolen, giving value therefor, in good faith, then you will find defendant not guilty." There was evidence tending to show that the defendant had purchased said animal, and the defendant was entitled to a direct, affirmative charge upon that issue. In the charge given by the court to the jury there is no such direct affirmative charge, but the issue is presented to the jury in a negative form, and in a connection which might have misled the jury. We think the above special instruction, or a similar affirmative one, instructing the jury that, if they believed, from the evidence, that the defendant purchased the animal, or if, from the evidence as to the purchase, they entertained a reasonable doubt that the defendant stole the animal, they must acquit him of the charge of theft. (*Murphy v. The State*, 17 Texas Ct. App., 645.) We are of the opinion that the failure of the court to give a proper charge upon the issue of purchase was material error, for which the conviction should be set aside.

We are also of opinion that the court erred in not granting the defendant a new trial. While the additional evidence disclosed by the affidavits accompanying said motion may not, in strictness, be regarded as newly discovered, still, we think fairness and justice required that a new trial should have been awarded. The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered November 26, 1887.

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No. 2733.

JUAN NAVARRO v. THE STATE.

1. **ABORTION—INDICTMENT.**—See the statement of the case for an indictment *held* sufficient to charge the offense of producing an abortion by an unlawful assault upon a pregnant woman.
2. **SAME—PRACTICE—EVIDENCE.**—In a prosecution for producing an abortion by an unlawful and violent assault, the injured female, although the wife of the accused, is a competent witness against him.
3. **SAME—EXPERT TESTIMONY.**—The prosecutrix in this case, having testified to the violence inflicted upon her by the accused, was also permitted to testify to her subsequent delivery of two dead children, to the condition of the bodies, and, without first being qualified as an expert, to the fact that the abortion was the result of the violence inflicted upon her by the accused. *Held*, that the evidence was improperly admitted, under the rule that when "a claimed result becomes so remote that conclusion and deduction are necessary to connect it with a cause, the non-expert witness can only state physical facts, leaving the conclusions to be drawn by the jury." This error, however, would, in this case, have been immaterial had the witness stated the facts upon which the opinion was based.
4. **PRACTICE—LEADING QUESTIONS** are permissible, even on direct examination, if the witness appears to be hostile to the party producing him, or is in the interest of the other party, or unwilling to give evidence. Note the opinion for a case in which, the witness coming within each of the exceptions to the general rule, her testimony was properly admitted.

APPEAL from the District Court of Cameron. Tried below before the Hon. J. C. Russell.

A term of four years in the penitentiary was assessed against the appellant upon his conviction under an indictment, the charging part of which reads as follows: * * * "That Juan Navarro, on or about the fifteenth day of June, 1887, in Cameron county, Texas, in and upon Manuela Rodriguez, a woman, then and there pregnant, did make an assault, and did then and there unlawfully, willfully and designedly, without the consent of the said Manuela Rodriguez, procure an abortion by then and there striking, kicking, and violently using the person of her, the said Manuela Rodriguez, during her said pregnancy."

Manuela Rodriguez was the first witness for the State. She testified that she lived in Brownsville, Cameron county, Texas,

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and was the wife of the defendant, and the alleged injured party. On or about June 15, 1887, the defendant, who was then in jail, sent the witness to see a lawyer for him. Witness did not return to the jail on that day, and when she did return, the defendant, who was jealous of her, accused her of sleeping with the lawyer, and kicked her on her abdomen. He then said that he was sorry, and that the witness could do with him as she pleased. Questions elicited from the witness the statement that, just before kicking her, the defendant said: "If that is my child, put it in my hands." Witness was then between five and six months advanced in pregnancy by the defendant. The kick administered by the defendant caused the witness to miscarry. She was delivered of a dead child on the ninth day after the defendant kicked her. The child was perfectly developed except that the skull was mashed or crushed in, and was in three pieces. She was delivered of another dead child nine days after the first delivery. The body of the last child was decomposed and in fragments. Witness had imparted life to the children before she was assaulted. She visited defendant at the jail on the day after he assaulted her, and continuously as long as she could walk. Defendant said that he was sorry he kicked her, and witness was on good terms with him. She told no one about being kicked by defendant, until she was brought to bed, when she told her sister, who filed the complaint against the defendant. Witness was married to defendant about eleven months before this trial, and this was her first pregnancy by him.

Guadalupe Rodriguez, the sister of the first witness, was the next introduced by the State. She testified that, on or about June 15, 1887, she lived with her said sister, who, about nine days after the said date, gave premature birth to a female child. It was born dead, but was fully developed. Its head was in several pieces. Nine days later Manuela was delivered of the decomposed body of another child, so badly decayed that its sex could not be determined, the feet only being entire. Juliana Gonzales, the midwife, was present at the first of the said deliveries. On the day that the first child was born, the witness made a complaint against the defendant before Judge Hune. Witness, her husband, and a casual visitor named Florentino Comacho, were present when the first delivery occurred. The witness had no personal knowledge of the cause of the premature births.

Juliana Gonzales testified, for the State, that she was a mid-

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wife, and acted as such to Manuela Rodriguez at the delivery of the first child. Witness removed the child from the womb and found that it was dead. Its head was in several pieces, but otherwise it was perfect for its period. It was about five months old. Witness could not tell how long it had been dead. She was not present at the alleged subsequent delivery, and knew nothing about it. The child of which the witness delivered Manuela was a male. The birth was a head presentation, and as it passed from the womb the pieces of skull fell into the witness's hands.

The State closed.

Ignacio Dominguez testified, for the defense, that he was the officer in charge of the Cameron county jail. Defendant was placed in that jail on a charge for misdemeanor some time before June 15, 1887. His wife, Manuela, visited him regularly up to some time in June. Witness was constantly about the jail, and never at any time heard of an assault upon Manuela by defendant. He distinctly remembers Manuela's last visit to the jail before her confinement. The defendant went to the jail kitchen and cooked some griddle cakes. Manuela left the jail about five o'clock on that evening. As she passed out she showed witness some of the cakes baked by defendant, and said: "See what it is to have a good husband. Being with child, I have had a longing for some cakes, and he has made them for me." Manuela always appeared to be on the best of terms with defendant.

L. Penaflor testified, for the defense, that he was jail cook during June, 1887, and often saw defendant and his wife together when the latter called. Defendant's treatment of his wife was always exemplary, and they appeared to agree admirably. Witness never heard of defendant assaulting his wife, or otherwise mistreating her, until this charge was brought against him.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. In this case there was no motion to quash the indictment; but its sufficiency was questioned by a motion in arrest of judgment. Without noticing separately the several grounds upon which it was based, it suffices to say that the indictment is not obnoxious to any one of them.

The trial was had upon a charge of procuring an abortion, by

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an unlawful assault upon the prosecuting witness, appellant's wife, the assault being alleged to have been made with the design of producing that effect. To prove the assault and the intent, the injured party, the wife of appellant, was introduced by the State. Under the statute, she was clearly a competent witness.

Testimony was given by the said witness to the effect that, in a fit of jealousy, appellant had kicked her on the abdomen, accompanying the act with words to be noticed hereafter. She further testifies that, about nine days thereafter, she gave birth to a still born child, its skull being crushed or mashed in, and in three pieces; that, after the lapse of another nine days, another was born, and that decomposition had so far set in that its sex was not distinguishable.

This witness was also permitted to testify, over objection, that the said abortion was the result of the kick described.

It is sometimes difficult to fix the point at which the competency of a non-expert witness, to assign a certain cause to a named result, ends. Assuredly, if one receive a blow which leaves an immediate marked impress that is appreciable by the senses of him who receives it, or that is in a like manner made sensible to bystanders, neither the injured party nor the on-looker need be an expert to qualify him to testify that the injury received was the result of the blow given. But, when a claimed result becomes so remote that conclusion and deduction are necessary to connect it with a cause, then the non-expert witness may only state physical facts and symptoms experienced, leaving the conclusion from them to the jury trying the cause. We are of opinion that the testimony was inadmissible, it coming within the last named class, and the witness not having been qualified as an expert.

For the error in admitting it, however, we would not feel authorized to reverse the judgment, had the witness gone on to state the facts upon which she based her opinion; for then the jury would have been enabled to compare and judge of the correctness of the conclusion. In her testimony there is an absence of such facts. True, she states that she "had felt life in the child before I (she) was assaulted by the defendant;" but she does not say at what length of time before, nor that she did or did not feel such sensation thereafter. No symptoms were testified to by her or others after the receipt of the kick, from which a conclusion as to its effect might be drawn. Then, again, the testi-

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mony fails to show definitely, or with reasonable certainty, as to whether the skull of the first child delivered was reduced to three pieces by violence, or whether it had fallen apart at the sutures, by reason of the decomposition that had set in. These facts were susceptible of proof, and should have at least been made reasonably certain.

In response to a leading question put by the district attorney (she having evaded other methods of eliciting the testimony sought) the same witness answered that appellant said, as he was in the act of kicking her, "if that is my child, put it in my hands." To the bill of exceptions thereto, the trial judge appends an explanation to the effect that he had permitted this form of question because the witness was ignorant of the language and generally dull, and that she had shown herself to be an unwilling witness. Leading questions are permissible, even in a direct examination, "where the witness appears to be hostile to the party producing him, or in the interest of the other party, or unwilling to give evidence." (1 Greenleaf on Ev., sec. 435.) The testimony and appended explanation of the bill of exceptions show the existence of all these three elements which remove the bar to the leading questions. The witness did not institute this prosecution; in fact, she was evidently "hostile" to it; she forgave, as only woman can (as is evidenced by her visits and ministrations to her husband in the jail to which a prior offense had consigned him), even up to the day she was prostrated by premature confinement; that she was "unwilling" to testify is manifest from her evasions of the very questions propounded to elicit this evidence. Under these circumstances, the form of the question was clearly allowable, and the evidence was material, as bearing upon the intent.

For the error noticed, the judgment must be reversed and the cause remanded.

Reversed and remanded.

Opinion delivered November 26, 1887.

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No. 2453.

M. F. THOMPSON v. THE STATE.

1. **HOMICIDE—ASSAULT AND BATTERY.**—If a homicide be committed under the influence of sudden passion, by the use of means not in their nature calculated to produce death, and in the absence of an intention to kill, the circumstances not showing an evil or cruel disposition, the party killing would not be guilty of culpable homicide, but, self defense apart, would be guilty of some grade of assault and battery. See the opinion for a discussion of the articles of the Penal Code relating to manslaughter.
2. **SAME—CHARGE OF THE COURT.**—The proof in this case raising the questions whether or not the accused intended to kill the deceased, and whether or not the means used were in their nature calculated to produce death, the trial court should have given to the jury instructions appropriate to those issues.
3. **SAME—SELF DEFENSE.**—If the evidence on a trial for murder raises the issue of self defense, the accused is entitled to a charge upon that issue direct and affirmative in character. See the statement of the case for a charge upon self defense held insufficient because negative.

APPEAL from the Criminal District Court of Harris. Tried below before the Hon. James Masterson, on exchange.

Under an indictment which charged him with the murder of John B. Pickren, the accused was convicted of manslaughter, and was awarded a term of two years in the penitentiary.

Doctor W. O. Langdon was the first witness for the State. He testified, in substance, that he was called to see the deceased, under information that he had just been stabbed. Deceased died just as witness got to him. The knife entered the body just above the heart. It did not strike that organ. It was evident that the wound was inflicted by some person facing the deceased, and was struck in, and towards the right side and from above. Witness made no particular ante mortem and no post mortem examination at all.

Seaborn West was the next witness from the State. He testified that he witnessed the difficulty in which the deceased was killed. While defendant was sitting on a box in front of a store, in the Fifth ward of Houston, Texas, watching a crowd of boys playing at the games of "I Spy" and "Hide and Seek," the

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deceased approached him and said something which the witness did not understand. Defendant got off the box and said: "Go away; I do not want anything to do with you; you called my mother a liar, and me a son of a b—h." As he jumped off the box the defendant ran his hand into his pocket. At this point the witness interfered, and said to defendant: "You had better go home; this is no place for a thing of that kind." Deceased, however, not satisfied, said to defendant: "I want to know how you make out that I called your mother a liar, and you a son of a b—h? I never spoke to your mother in my life. Who can you prove it by?" The defendant replied that he could prove it by his mother's negro cook. Deceased replied that he made no such imputations upon the character of either the defendant or his mother, and that he did not want the defendant about his ice house any more. Defendant replied that he could get in elsewhere; that he did not want deceased to fool with him any more, and that deceased's life was "getting shorter, any how." Deceased then threatened to slap the defendant, and defendant told him to slap. Deceased slapped defendant, and the two clinched, and pressed each other against the wall of the store. During the struggle which there ensued, the defendant called to the boys: "Don't let him hurt me!" The boys laughed. About that time the witness rushed in and pulled defendant off, and as the deceased stepped back he said: "You will hit me with brass knucks again, will you?" Deceased then fell, and defendant stooped over him, calling in a distressed voice: "John! Oh John!" About that time Cutter Rawley, deceased's partner, came up, and asked defendant: "M. F., did you cut him?" Defendant replied: "Yes, and by God, I would cut him again." At that particular time Doctor Langdon arrived. Witness did not hear what the deceased said to defendant when he first came up and spoke. He did not see the defendant strike the fatal blow, nor did he see the instrument with which he inflicted the fatal wound. Deceased was a heavier, if not a taller, man than defendant. Witness knew nothing of any previous difficulty between deceased and defendant. He had often seen them together, and they always appeared to be good friends.

Other witnesses for the State gave the same general account of the difficulty. None of them saw the instrument with which the fatal wound was inflicted. Some did, and some did not, hear deceased's remarks about being struck with brass knucks, but none of them saw any brass knucks. One or two of the wit-

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nesses, testifying that defendant's mother appeared upon the scene just after the cutting, said that she exclaimed to defendant: "I told you not to leave home to-night; and I told you not to take that knife with you."

The witnesses for the defense gave the same general account of the fight, except that, according to them, the deceased, after defendant told him to go away, and that he did not want to have any thing to do with him since he applied the epithets to him and his mother, started off, and returned, before he threatened to and did slap the defendant, and that defendant had not yet left the box when deceased slapped him. None of the witnesses for the defense heard anything said about brass knucks, and, although all of them heard the defendant's mother remark that she had asked defendant not to visit the Fifth ward on that night, none of them heard her say anything about the knife. The said witnesses for the defense concurred in the statement that deceased struck the defendant first, hitting him two blows in the face, and followed up the attack until the defendant was pressed to the wall of the store. The defendant's mother stated that she not only did not say any thing to defendant about leaving his knife at home, but that she did not even know that he had a knife. In response to witness's reproaches for what had occurred, uttered immediately after the killing, the defendant said: "I couldn't help it; I had to do it; he struck me twice, and called you a liar and me a son of a bitch." One or two witnesses for the defense testified that the defendant was a quiet, peaceable boy, and that the deceased was a man, much older and heavier than defendant.

The charge of the court on the issue of self defense, referred to in the third head note of this report, reads as follows: "Homicide is justifiable under the law in the protection of one's person against any unlawful and violent attack, but the attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death, or serious bodily injury."

The motion for new trial raised the questions discussed in the opinion.

Jones & Garnett, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

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HURT, JUDGE. This is a conviction for manslaughter. If it was a voluntary homicide, then the conviction is correct; for the facts surrounding the killing show such an offense. But, suppose the intent to kill was wanting, under a state of facts which would make the homicide manslaughter—if the accused intended to kill—of what offense would the accused be guilty, if death ensued?

To constitute manslaughter, there must be a voluntary killing. Webster defines the word *voluntary* thus: "Done by design, or intention; purposed, intended; as, if a man kill another by lopping a tree, it is not voluntary manslaughter." If, then, the homicide can not be manslaughter unless there was an intention to kill, strip the case of murder and self defense, of what offense would the party killing be guilty? In other words, the circumstances are such as to constitute manslaughter, if there was the intent to kill—if the homicide was voluntary.

Now, if the homicide occurs by the use of means which are not in their nature calculated to produce death, the person killing is not to be deemed guilty of homicide, unless there was an intention to kill. But, suppose the means used were calculated to produce death, but there was no intention to kill—the sudden passion existing—would the homicide in such a case be manslaughter? Unquestionably, it would. (Penal Code, art. 614.) Here there seems to be a conflict; for we have seen that, to constitute manslaughter, there must be an intentional killing. To reconcile this conflict, we are of opinion that, though there is no intention to kill, yet, if the means used were in their nature calculated to produce death, and the killing is under sudden passion, then the party killing would be guilty of manslaughter.

This view is strengthened by a provision of article 615, which is that, if the circumstances attending the killing show an evil or a cruel disposition, the party killing may be guilty of manslaughter, though there was no intention to kill. We decide this proposition from all the provisions of the statute bearing upon this question: Where a homicide occurs under sudden passion, by the use of means not in their nature calculated to produce death, in the absence of an intention to kill, the circumstances not showing an evil or cruel disposition, the party killing would not be guilty of the homicide, but, self defense apart, would be guilty of some grade of assault and battery.

By reference to the facts it will be found that there is a question raised as to whether appellant intended to kill the deceased;

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and it will also be found that an issue is presented as to whether the means used were in their nature calculated to produce death. In this state of case the trial judge should have submitted, by proper instructions, these issues to the jury. And if the jury had failed to find the intent to kill, or that the means used were in their nature calculated to produce death, then a verdict for some grade of assault and battery may or should have been the result.

We are by no means willing to sustain the charge of self defense; it is negative in character, when, under a well established rule, it should have been affirmative. We can not add any thing to that which has already been said by this court upon such charges.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered November 26, 1887.

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No. 2732.

ROBERT STOCKMAN v. THE STATE.

1. **THEFT—PRACTICE—EVIDENCE.**—The prosecuting witness having testified on his direct examination that he found his stolen sheep in the possession of one D., and that D. at first agreed to surrender the animals, but subsequently refused to do so, was asked on his cross examination if D., when he refused to surrender the sheep, did not assign as his reason for so doing that he had purchased them. This question and the answer thereto were excluded as hearsay. *Held:* That the ruling was error, the question and the answer being legitimate under the rule that when "part of a conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other."
2. **SAME.**—The questions and answer should also have been admitted under the rule that "when an act is done to which it is necessary or important to ascribe a character, motive or object, what was said by the actor at the time, from which the character, motive or cause may be collected, is part of the *res gesta*—verbal acts—and may be given in evidence, whether the actor be or be not a party to the suit."
3. **POSSESSION OF RECENTLY STOLEN PROPERTY—CHARGE OF THE COURT.**—With respect to the presumption arising from the possession of recently stolen property, the trial court charged the jury as follows: "If a person is found in possession of property recently stolen, and if the circum-

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stances are such as call upon him for an explanation, and he fails to give any explanation of such possession, then these facts would authorize his conviction, if a presumption of guilt has arisen in the minds of the jury from such facts." *Held* erroneous, as being a charge upon the weight of evidence. See the opinion *in extenso* for the correct rule upon the subject.

APPEAL from the District Court of Uvalde. Tried below before the Hon. T. M. Paschal.

The conviction in this case was for the theft of two hundred and seventy-five head of sheep, the property of C. S. Chilton, in Uvalde county, Texas, on the eleventh day of September, 1886. A term of two years in the penitentiary was the penalty assessed against the appellant.

W. C. Bell was the first witness for the State. He testified that he knew the defendant by sight, but had no personal acquaintance with him. C. S. Chilton's ranch was in Uvalde county, about ten or eleven miles north of the town of Uvalde. On or about September 1, 1886, the witness, being then on his way to Uvalde in a hack, saw the defendant and one June Dean going north towards Chilton's ranch. They were in the road which leads from Uvalde to Leakey, in Edwards county, and were about three miles from Chilton's ranch. Witness then knew Dean, but had never before seen the defendant. When he met them the witness gave them some peaches, of which he had a supply in his hack, and observed them closely. Chilton's ranch was some little distance off the road that defendant and Dean were traveling. Witness did not see defendant and Dean again until after their arrest.

Butch Patterson was the next witness for the State. He testified that he knew the defendant only by sight, having seen him two or three times. The witness and one Tulley passed Johnson's tank on the Uvalde and Leakey road, on or about September 1 or 2, 1886. On that occasion he saw June Dean and another man at the tank, but was unable to say whether or not the defendant was the other man. He did not know what business June Dean and his companion had at the tank. They had their horses, but nothing else with them. Witness did not take especial notice of the horses, nor did he see any sheep about the tank, nor on the road near the tank.

James Beeson testified, for the State, that he knew the defendant and one June Dean. Witness saw the defendant and Dean

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on Brushy creek in Uvalde county on September 3, 1886. They were driving a flock of sheep towards the Mitchell ranch, at which the said Dean was then living. Witness did not know where the defendant lived. Between two hundred and three hundred sheep were in the drove driven by the defendant on the occasion referred to. When witness saw Dean and defendant with the sheep they were in a rough, brushy, mountainous country, and were off the Uvalde and Leakey road. They were not traveling a public road, and the only trails were the cow trails around the hollows. They, however, were not following a cow trail. When witness saw the parties, Dean was walking, and defendant was riding a horse and leading another horse. They looked towards the witness and he was confident they saw him, for they at once turned the sheep. The witness, at the time he saw the said parties and the sheep, was three miles from home, building a brush fence. The parties were some five or six miles from the road, up Frio canyon. They were flanked by other roads at the distance of about two miles. On his cross examination, this witness stated that the parties and the sheep were about two hundred and eighty yards distant from him when he saw them. He had seen the defendant only twice before that occasion. Witness saw the parties for a short distance only, and did not know where they took the sheep to, nor did he know where they brought them from. The witness saw no brand nor tar marks on the sheep. It was not an uncommon thing to see people driving sheep through that country.

C. S. Chilton testified, for the State, that in September, 1886, he kept his sheep in Uvalde county, Texas, their range extending from the dry Frio road to the main Frio road, and along the road leading from the town of Uvalde to Leakey in Edwards county. The witness was in the habit of counting his sheep at least once a week, and when he counted them about the first of September, 1886, he found that about three hundred of them were gone. Witness hunted unsuccessfully for them for four or five days, and then, acting upon certain information, he went to the shearing camp of Mr. June Dean, where he found Mr. Dean, and asked him about the sheep, which he described by the tar brand. Dean replied that he had sheep answering to the said description, but that they were not then at his corral. Witness and Dean then went to a shearing pen about two miles from Dean's house, where witness found two hundred and ninety-three head of his sheep. Nearly all of the said sheep had been

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recently sheared. The flock contained some seventy head that had not been sheared. On the way from Dean's house to the shearing pen, witness and Dean met defendant, and asked defendant about the sheep, and he told them where they would be found. Witness and Dean found the sheep on the mountain designated by defendant, rounded them up and drove them to Kelley's camp. The sheep were counted at Kelley's camp. Before the counting, Dean said that witness could take the sheep, but after the counting he said that he could not permit witness to take them. The witness then recovered the sheep through the sheriff. The said sheep were worth about one dollar a head. The sheep were recovered by witness on or about September 10, 1886. No one had the consent of the witness to take the sheep.

Cross examined, the witness said that when he asked Dean about his sheep, Dean said that he had them. The defendant was not with the sheep when witness and Dean met him, but was in a little valley about a half a mile from where the sheep then were. He told at once where the sheep were, and as a reason for not going with witness and Dean to get them said that he was sick. All the conversation with the defendant was conducted by Mr. Dean. The witness was then asked if, in the conversation with Dean when Dean, after agreeing to surrender the sheep, refused to do so, he did not say that his reasons for refusing to surrender them was that he had purchased them. His question was objected to and the objection was sustained.

John Dulaney was the next witness for the State. He testified that June Dean, in September, 1886, lived in a house at the head of Bear creek in Uvalde county, Texas. His shearing camp was about three and a half miles from his house, off the road, and in a brushy hollow. The road leading from Uvalde to Dean's house, and from Johnson's tank and Roberts's ranch to Dean's house, was the same until it reached a point near the mouth of Bear creek, where it branched—the branch leading to Dean's house. The witness knew that Chilton got some sheep at the Dean shearing place sometime early in September, 1886. Witness was at that place a few days before and saw the shearing of some sheep. One Parsons, Ell Reed, Ike Cox, and a Mexican did the shearing. That shearing place was on Blanket creek. The witness did not know who owned the sheep he saw sheared at that place, but knew them to be the same sheep which Chilton afterwards claimed and took. Witness did not see June Dean nor the de-

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fendant at the shearing camp while the said sheep were being sheared.

J. H. Van Pelt testified, for the State, that a person going from Uvalde to June Dean's house would travel up the Frio road to the Frio river, and until reaching the mouth of Bear creek, whence a branch road led to Dean's house. Witness saw the sheep and the shearing referred to by the witness Dulaney, and helped transport the wool from the shearing camp to the place of deposit. The sheep were sheared in an unfrequented and isolated hollow, about three miles from Dean's ranch. The pen at the shearing place was newly made, and was about three miles distant from any road.

The State closed.

J. C. Mitchell testified, for the defense, that he lived in the Sabinal canyon, between which and Bear creek in Uvalde county all the land owned by witness is situated, except two hundred acres projecting into Bandera county. Witness gave June Dean permission to range his sheep on the Blanket creek land which witness owned. Dean's camp was not on witness's land, but was near it, and Dean, in September, 1886, occupied witness's Bear and Blanket creek lands for sheep grazing purposes. The witness's loose sheep ranged on that land, which was a fine region for sheep grazing.

Ell Reed testified, for the defense, that he knew the defendant and June Dean. In September, 1886, Dean's camp was situated on Bear creek, about two hundred yards from the main road. His shearing pen was about two miles across country, or three or four miles by the road, from the said camp. Witness was in Dean's employ between the first and tenth days of September, 1886, and at that time was shearing sheep at the said pen. He was helped by one Parsons, Ike Cox and a Mexican. While witness, Parsons, Cox and the Mexican were shearing a flock of about two hundred sheep, a party of men came to the pen and said that the flock was one that had been stolen and that they had been looking for. Dulaney, Van Pelt, Ware, Taylor and Peebles were the men of said party. Witness and his party quit shearing, turned the unsheared sheep loose and started to June Dean's house. At the time of said shearing, defendant was cook for the party and herded the sheep and helped pack the wool. He gave no orders about the sheep or the shearing. On the way to Dean's house, the witness and his party met Dean, who turned them back to the pen. Witness passed that night

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with defendant, and was with him until morning, and knew that he then made no claim to the sheep, nor at any time did he attempt to exercise any ownership over them. Dean and defendant were arrested on that day.

Ike Cox, for the defense, testified as did the witness Reed with regard to the defendant's connection with the sheep at the time of the shearing of the same.

The motion for new trial raised the question discussed in the opinion.

Austin Pollard, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. On his direct examination the State had proved by the prosecuting witness Chilton that, in looking for his lost sheep, he went to the shearing camp of one Dean, and there saw Dean and had a conversation with him about the sheep, in which Dean stated that he had the sheep; also that Dean, at one of the conversations had with him, gave his consent for witness to take the sheep, and that subsequently he refused to let him do so. On cross examination by defendant, the witness was asked if in the conversation in which Dean declined to give up the sheep he, Dean, did not claim as a reason for his action that he had purchased them. This question and the answer thereto were objected to, and the objection was sustained upon the ground that the evidence sought to be elicited was hearsay.

The evidence was admissible upon the principle that "when part of a conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other." (Code Crim. Proc., art. 571.) Another well settled rule under which the evidence was also legitimate and admissible is that, "when an act is done to which it is necessary or important to ascribe a character, motive or object, what was said by the actor at the time from which the character, motive or cause may be collected is part of the *res gestæ*—verbal acts—and may be given in evidence, whether the actor be or be not a party to the suit." (1 Greenl. Ev., sec. 108, and note, and note on page 130; *Williams v. The State*, 4 Texas Ct. App., 5; *Sager v. The State*, 11 Texas Ct. App., 110; *Pharr v. The State*, 9 Texas Ct. App., 129.)

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In the sixth paragraph of the charge of the court, which is specially complained of, the jury were instructed: "If a person is found in possession of property recently stolen, and if the circumstances are such as call upon him for an explanation and he fails to give any explanation of such possession, then these facts would authorize his conviction if a presumption of guilt has arisen in the minds of the jury from such facts." It is not for the judge to say what amount or degree of evidence is sufficient to warrant a jury in convicting. To do so is to charge upon the weight of evidence, and is reversible error. (*Rice v. The State*, 3 Texas Ct. App., 451; *Lunsford v. The State*, 9 Texas Ct. App., 217; *Stephens v. The State*, 10 Texas Ct. App., 120; *Stone v. The State*, 22 Texas Ct. App., 186.)

In *Ayres v. The State*, 21 Texas Ct. App., 399, it was held that "possession of recently stolen property, if such possession be unexplained, is prima facie evidence of theft, such as will authorize the inference or presumption of guilt, but such inference or presumption is not a mere legal one, but is one of fact to be found by the jury. The trial court should in no instance charge the conclusiveness of such inference and presumption, but should submit them as facts to be found by the jury; for, at most, they are but circumstances from which guilt is inferred, and not positive proof establishing it."

For the errors discussed, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered November 26, 1887.

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No. 2607.

EX PARTE E. J. TRADER.

1. **HABEAS CORPUS—JURISDICTION OF THE COURT OF APPEALS.**—All district judges of this State are authorized by the Constitution to grant the writ of habeas corpus in felony cases, and it is a statutory principle that "every provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy and protect the rights of the person seeking relief under it." Another well settled rule is that "a party's right to the writ does not depend upon the legality or illegality of his original caption, but upon the legality or

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illegality of his present detention." Under these rules the judge below had the power to grant and hear the writ of habeas corpus in this case, and this court acquired jurisdiction by appeal; wherefore the State's motion to dismiss the appeal is overruled.

2. **SAME—CASE STATED.**—The relator was indicted for murder in K county. He secured a change of venue to D county, where he was admitted to bail. Upon his release he went to E county where, under statutory proceedings had in the county court, he was legally declared to be a lunatic, and was ordered to be confined in the State Lunatic Asylum, but subsequently, under the provisions of Article 118 of the Revised Statutes, he was placed in the custody of relatives and friends who entered into bond to care for and restrain him. Subsequently the case against him for murder was called in the district court of D county, and upon his default his bail bond was forfeited, and alias capias for his arrest was awarded, which was afterwards executed by the sheriff of E county. Thereupon his custodians, who held him as a lunatic under the authority of the county court of E county, applied to the judge of the district court of E county for the writ of habeas corpus. The writ was granted, but upon the hearing of the same, the said district judge remanded the relator to the custody of the sheriff. Upon this state of case, the custodians of the relator insist, on this appeal, that there is no mode provided by our law by which the sanity of an accused can be inquired into in the district court *before* the commencement of the trial upon the merits of the case under the indictment; and that, if insane, or he becomes so after the commission of the offense, he can not be placed upon trial while in such condition—which latter proposition is statutory. But that statute (Penal Code, art. 89) has been held to mean that "when a defendant charged with felony has become insane, a jury should be impaneled to try the issue of insanity, before proceeding with the cause upon its merits." Upon this whole case it is *held* that the district judge of E county properly awarded the writ of habeas corpus, but, under the provisions of Article 187 of the Code of Criminal Procedure, which provides that "after indictment found, the writ of habeas corpus must be made returnable in the county where the offense has been committed," the same should have been made returnable to the judge of the district court of K county; and this court so orders.

HABEAS CORPUS on appeal from the district court of Eastland. Tried below before the Hon. T. H. Conner.

The opinion discloses the entire case.

J. H. Davenport, R. B. Truly and Teel & Halton for the relator.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. A brief statement of the facts as

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presented in the record will best illustrate the proceedings had before the district court, and the questions submitted for our adjudication upon this appeal.

At the October term, 1885, of the district court of Karnes county, E. J. Trader was indicted for murder. The venue was changed to, and the indictment filed in, the district court of DeWitt county, on the thirty-first day of October, 1885. In said latter court it appears that Trader was duly and regularly admitted to bail to answer said indictment, and thereby was released from corporeal confinement and custody. He left DeWitt and went to Eastland county, where his wife, his father and other relatives resided.

On the thirtieth day of April, 1887, an information in writing, under oath and in terms of the law (Rev. Stats., art. 106) was made to the county judge of Eastland county, by the father, that his son, E. J. Trader, was a lunatic, or *non compos mentis*. By regular proceedings had in conformity with the statutes in such cases made and provided (Rev. Stats., art. 106 to 114, inclusive) a trial of his lunacy was had, and by verdict and judgment rendered thereon, on the fifth of May, 1887, in the county court of Eastland county, said E. J. Trader was declared a lunatic, and ordered to be conveyed to the lunatic asylum at Terrell for restraint and treatment. His relatives and friends, however, having proposed to undertake his care and restraint, and to execute a bond to that effect, were permitted to do so, and he was duly turned over to their care and custody, under the provisions of article 118, Revised Statutes. Whilst so in their custody, Trader, who was a physician by profession, was allowed to, and engaged in, the practice of medicine to some extent.

At the September term, 1887, of the district court of DeWitt county, when the murder case against Trader was called for trial, and he was found not present to answer to the indictment, his bail bond was regularly forfeited, and alias *capias* for his arrest was awarded, which issued the fifteenth day of September, 1887, and came into the hands of the sheriff of Eastland county, and was by him executed by arresting the defendant on the twentieth day of September, 1887.

Upon application to him for that purpose by the relatives and friends of Trader, who had as aforesaid given bond for his keeping, custody and restraint as a lunatic, the Hon. T. H. Conner, judge of the forty-second judicial district, of which Eastland county was one of the counties in said district, granted to the

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said applicants a writ of habeas corpus to have the legality of the arrest of Trader under the alias *capias* from De Witt district court tested, and for his discharge from arrest under said writ and restoration to their custody as his legal guardians and bondsmen by virtue of the judgment of the county court of Eastland county on the trial *de lunatico inquirendo*.

The habeas corpus was granted by Judge Conner, and a full return made to the same by the sheriff of Eastland county, setting forth the facts and the alias *capias* as his authority for his arrest and detention of the alleged lunatic. A hearing was had by Judge Conner under the writ of habeas corpus, on the first of October, 1887, and the result was that he remanded Trader to the custody of the sheriff instead of to the applicants, his bondsmen. From this judgment the bondsmen appeal to this court.

A motion is here made by the assistant attorney general to dismiss the appeal because Judge Conner had no jurisdiction to hear and determine the case on habeas corpus, and that consequently this court can have and acquire no jurisdiction by the appeal. Had Judge Conner refused to grant the writ, or refused to hear and dispose of it upon its merits, then we are of opinion that there could be no question but the motion would have been well taken. This, however, is not the case presented. All district judges under the Constitution are authorized to grant the writ of habeas corpus in felony cases (Const., art. 5, sec. 8), and it is expressly provided by statute that "every provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy and protect the rights of the person seeking relief under it." (Code Crim. Proc., art. 134.) Another rule well settled is that "a party's right to the writ does not depend upon the legality or illegality of his original caption, but upon the legality or illegality of his present detention." (Ex Parte Coupland, 26 Texas, 387.)

There is great plausibility in the able argument and brief of counsel for relator, to the effect that Trader being a citizen of Eastland county, and becoming insane, the county court of that county was the proper forum in which to inquire into and determine the question, and that, when it had once determined the question by judgment and conviction of lunacy, such judgment was binding until set aside or discharged in that forum, and that any interference with said judgment by any other tribunal would be unauthorized and illegal. In our view of the case it is unnecessary to discuss these matters. It is strongly insisted that

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there is no mode provided by our law by which the sanity of a party can be inquired into in the district court *before* a trial is commenced on the merits of a case upon indictment; and that, if insane, or he becomes so after the commission of an offense, he can not be put upon trial for the same while in such condition. The latter proposition is statutory. (Penal Code, art. 39.) But in construing this same article in *Guagando v. The State*, 41 Texas, 626, the Supreme Court held that when a defendant charged with felony has become insane a jury should be impaneled to try the issue of insanity before proceeding with the cause upon the merits.

It is insisted by the Assistant Attorney General that the habeas corpus should have been made returnable by Judge Conner to and before the district court of Karnes county, and that the former, if he had authority to issue it at all, had no authority or jurisdiction to hear and determine the same; and in support of this position he cites article 137, Code of Criminal Procedure, which declares that "after indictment found the writ (of habeas corpus) must be made returnable in the county where the offense has been committed on account of which the applicant stands indicted" (*Ex parte Ainsworth*, 27 Texas, 731); and article 138, Code Criminal Procedure, which provides that in all cases where a person is confined on a charge of felony, and indictment has been found against him, he may apply to the district judge of the district court for the district in which he was indicted, etc.

In this case the trouble is that Trader in effect was in confinement or subject to custody by process of two different courts, legally empowered to act as they had done, and which two different authorities had created for and on his account liabilities conflicting in character. Under the peculiar facts of the case we are of opinion Judge Conner had authority to grant the writ of habeas corpus, but we think he should have made it returnable before Judge Pleasants, the district judge of Karnes county, where the offense was committed for which the applicant stood indicted, and who could have disposed legally of all questions pertaining to the status of the defendant with reference to his trial under the indictment for murder.

This being our solution of the matter, the judgment herein rendered below will be set aside, and it is ordered that the writ of habeas corpus be made returnable before Judge H. Clay Pleasants, judge of the twenty-fourth judicial district of Texas, who will designate the time and place for hearing the same in

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Karnes county, and give the parties interested due notice thereof. It is further ordered that the sheriff of Eastland county hold the applicant E. J. Trader in his custody, subject to the orders of the said judge of the twenty-fourth judicial district, "to be proceeded with according to law." (See Rev. Stats., art. 118.)

Ordered accordingly.

Opinion delivered November 26, 1887.

No. 2672

ED OSBORNE v. THE STATE

INDICTMENT—AMENDMENT.—A misstatement in an indictment as to the day on which the term of the court at which the same was presented began goes to the form and not to the substance of the indictment, and may be amended under the order of the court by merely erasing the wrong date and substituting the proper one. Moreover, such amendment is unnecessary, as the allegation of the time when the term began was mere surplusage.

APPEAL from the District Court of Colorado. Tried below before the Hon. George McCormick.

This was the appellant's second appeal from his conviction in the first degree for the murder of West Kirby, in Colorado county, Texas, on the twenty-second day of December, 1886. The penalty assessed against him was a life term in the penitentiary. The conviction was had upon identically the same evidence, delivered by the same witnesses, as on the first conviction, and that evidence will be found fully set out in the report of the case, commencing page 431 of the twenty-third volume of these Reports.

John C. Mitchell, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. As presented in court by the grand jury, the indictment recited that it was found at a term of the district

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court for Colorado county, State of Texas, beginning on the *first* Monday after the first Monday in February, 1887. This was an erroneous statement of the time of the beginning of the term of the said court at which said indictment was presented, said term having begun on the *fourth* Monday after the first Monday in February, 1887. Upon motion made by the district attorney for leave to amend the indictment so as to correct the said erroneous recital, such leave was granted, and thereupon the district attorney, in open court, and with the knowledge of the court, erased the word "first" and inserted in its stead the word "fourth," in the original indictment, so as to make it appear that the term of the court at which the indictment was presented commenced at the proper time—that is, on the *fourth* Monday after the first Monday in February, 1887. To this amendment of the indictment, made in the manner above stated, the defendant excepted, and through his counsel urgently insists that it constitutes error for which the conviction should be set aside.

When this case was before us on a former appeal, we held, with reference to this supposed defect in the indictment, that it related to matter of form, and was amendable. (23 Texas Ct. App., 431.) But it is now contended that the amendment was not properly made, because it is not recited in the minutes of the court that it was made, etc. In the case of *Bosshard v. The State*, 25 Texas Supplement, 207, a similar amendment of an indictment was made, and made by inserting a word in the original indictment, and there was held to be no error in the proceeding. In *Sharp v. The State*, 6 Texas Ct. App., 650, a similar amendment was held to have been correctly made. It is directed by statute that "all amendments of an indictment or information shall be made with the leave of the court, and under its direction." (Code Crim. Proc., art. 551.) The form and manner of such an amendment are not prescribed, nor is it expressly required that an entry thereof shall be made upon the minutes of the court. If made with the leave of the court, and under the direction of the court, it is a legal amendment. In this instance the record affirmatively and clearly shows that the amendment was made with leave of the court, and under the direction of the court. In our opinion, the amendment was wholly unnecessary. It was surplusage to allege the time when the term of the court began, and this portion of the indictment might have been stricken out without invalidating the indictment.

No other error than the supposed one above noticed has been

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presented by counsel for appellant. We have, nevertheless, given the record a careful examination, and we find no error in the conviction. The judgment is affirmed.

Affirmed.

Opinion delivered December 7, 1887.

No. 2717.

S. M. WILLS v. THE STATE.

SWINDLING—INDICTMENT charged the offense of swindling by means of a promissory note, which, though he knew it to be neither valid nor genuine, the accused represented to be good, valid and genuine. The indictment sets out the note in *hæc verba*, and upon its face it appears to be a valid obligation. The indictment, however, fails to allege the facts which render the note invalid and worthless. Exception to the indictment and a motion in arrest of judgment based upon this omission were overruled. *Held*, that the exception and the motion in arrest were well taken, and should have prevailed.

APPEAL from the District Court of Taylor. Tried below before the Hon. T. H. Conner.

The opinion states the case. The penalty assessed was a term of two years in the penitentiary.

M. A. Spoonts, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. It is alleged in the indictment, in substance, that the defendant swindled one D. Gordon out of thirty dollars in money, by means of a certain promissory note, which note is set forth in *hæc verba* in the indictment. It is alleged that defendant falsely represented to said Gordon that said note was a good, valid and genuine promissory note, etc., whereas, in truth and in fact, it was not a good, valid and genuine promissory note, but was valueless, which fact defendant well knew, etc. Exceptions were made by the defendant to the indictment, which were overruled. Also, after conviction, defendant moved in ar-

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rest of judgment, specifying, as grounds for said motion, several supposed defects in the indictment, one of said grounds being that said indictment does not allege the reason why said promissory note was not valid, etc. The motion in arrest of judgment was overruled.

We are of the opinion that the indictment is fatally defective in that it does not show the facts which rendered the said promissory note invalid and worthless. As set forth in the indictment, said note appears to be a valid obligation. If it was in fact a forged instrument, or was without consideration, or had been paid, or was, for any other reason, invalid and worthless, the indictment should have disclosed the facts rendering it so, and thus have apprised the defendant of the particular case he was called upon to answer. An indictment in substance the same as this one was, for the same defect here insisted upon, held bad by our Supreme Court in *The State v. Dyer*, 41 Texas, 520. That case being in point, and being in our opinion correct in principle, is decisive of this one.

Because the court erred in overruling the exceptions to the indictment, and in overruling the motion in arrest of judgment, the judgment is reversed, and because the indictment is substantially defective the prosecution is dismissed.

Reversed and dismissed.

Opinion delivered December 7, 1887.

No. 2735.

NARCISSE MORENO AND PABLO MORENO v. THE STATE.

1. **THEFT—POSSESSION OF RECENTLY STOLEN PROPERTY—CHARGE OF THE COURT.**—Possession of stolen property, whether recent or remote, is a circumstance admissible in evidence, to be considered by the jury in connection with the other proof in the case. But to warrant the inference of guilt from the possession alone, the possession must be a personal one; must be recent and unexplained, and must involve a distinct and conscious assertion of claim by the possessor. Note the opinion for a state of proof to which this rule applies; wherefore, in refusing a special charge in harmony with the principle, the trial court erred.
2. **SAME.**—But note that, in this case, even had the charge been given, the evidence would not support a conviction, because recent possession

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alone, without an opportunity to explain, will not authorize a verdict of guilty. Had the special charge been given, the evidence would still have demanded the award of a new trial.

8. **SAME—FACT CASE.**—See the opinion in *extenso* for a summary of the inculpatory proof in this case *held* insufficient to support a conviction for theft of cattle.

APPEAL from the District Court of LaSalle. Tried below before the Hon. D. P. Marr.

The opinion discloses the case. The penalty assessed was a term of five years in the penitentiary against each of the appellants.

No brief for the appellants.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. Narcisso Moreno and Pablo Moreno, with Nicolas and Geronimo Moreno, were jointly indicted for the theft of three head of cattle, the property of H. C. Yeager. Narcisso and Pablo were convicted.

The criminative facts are these: The prosecutor, in company with Captain McKinney, sheriff and posse, went to the house of Nicolas Moreno. Nicolas is the father of the appellants. The accused lived in three houses about forty steps apart. In the house of Pablo Moreno a hide was found which was taken from a cow, the property of the prosecutor. In a hole of water about sixty yards from the house, another hide was found, which also belonged to a cow of the prosecutor. Yeager states that no hides were found in Narcisso's house, and that he knew of nothing connecting Narcisso with the hides, except that he lived on the ranch, and is a brother of Pablo and a son of Nicolas Moreno. The witnesses state that the parties were not called upon to explain the possession of the hides.

Condensed, the case made against Pablo is that a hide which was taken from a cow of the prosecutor is found in his house. When arrested, he was not informed of the cause; his attention was not called to the fact that the hide was found in his house, and that he was suspected of the theft of the animal. In fact, he was not called upon, directly or circumstantially, for an explanation of the fact that the hide from a stolen animal was

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found in his house. Here we have a case, putting it most strongly against the accused, of recent possession of the stolen property—holding the fact that the hide was in his house equivalent to recent possession.

This being the case, counsel for appellant requested this charge: "The possession of stolen property, whether recent or remote, is a circumstance admissible in evidence, to be considered by the jury, in connection with the other proof in this case. But to warrant the inference of guilt from the possession alone, the possession must be a personal one, must be recent and unexplained, and must involve a distinct and conscious assertion of claim by the possessor. To convict solely on recent possession of stolen property, and to make it a *prima facie* case, the property must be stolen by some person; the possession must be recent; the defendant must be called upon to explain, and fail to explain, or to fail to explain when the facts are such as to require an explanation, defendant having had an opportunity to do so."

We are of opinion that the case demanded the above charge, and its refusal was error. (*Robinson v. The State*, 22 Texas Ct. App., 670; *Ayers v. The State*, 21 Texas Ct. App., 395; *Lehman v. The State*, 18 Texas Ct. App., 174; *Sullivan v. The State*, Id., 623; *York v. The State*, 17 Texas Ct. App., 441; *McNair v. The State*, 14 Texas Ct. App., 83.)

Again, suppose the above charge had been given, and the jury had convicted, the motion for new trial should have been granted, because recent possession alone, without an opportunity to explain, is not sufficient to warrant the verdict. There is no criminating circumstance in this case save the fact that the hide was found in Pablo Moreno's house. As to Narcisso Moreno, there is no inculpatory fact, except that he lived in a house about forty steps from his father, was the brother of the other defendant, and the son of Nicolas Moreno. The judgment is reversed because the court erred in not giving the requested charge, and because the evidence fails to support the verdict as to both appellants.

Reversed and remanded.

Opinion delivered December 7, 1887.

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No. 2738.

ED CROWELL v. THE STATE.

1. **THEFT—CIRCUMSTANTIAL EVIDENCE—CHARGE OF THE COURT.**—The *factum probandum* of theft, as that offense is defined by our statute, is the *taking* of the property. If the *taking*, being the main fact in issue, is not directly attested by an eye witness, but is proved as a matter of *inference* from other facts in evidence, the case rests wholly upon circumstantial evidence, and the failure of the trial court to give in charge to the jury the law of circumstantial evidence is material error. See this case in illustration.
2. **SAME—CORPUS DELICTI—ACCOMPLICE TESTIMONY—FACT CASE.**—The *corpus delicti* of theft can not be established by the uncorroborated testimony of an accomplice, but upon that issue the accomplice must be corroborated by other evidence tending to show the commission of the offense, and the defendant's connection with the commission of the same. It will not suffice to corroborate such testimony only to the extent of connecting the defendant with the commission of an act alleged to be an offense. In this case the ownership of an animal alleged in the indictment was proved only by the uncorroborated testimony of the accomplice. *Held*, insufficient on the issue of ownership, and, therefore, insufficient to support the conviction.
3. **SAME—CHARGE OF THE COURT.**—See the statement of the case for a charge of the court upon accomplice testimony *held* erroneous, because it applies the law too broadly to the facts of the case, and does not, as it should, require the corroboration of the accomplice to be as to facts tending to show the commission of an offense, and the defendant's connection with such commission.
4. **SAME**—The charge in this case is otherwise erroneous in that it instructs the jury that the *killing* of the animal constituted the offense, whereas the *taking* (if any) of the animal constituted the offense. Moreover, the facts demanded that the charge should submit to the jury whether the witness M. was an accomplice, and in omitting to do so, and in refusing the defendant's requested instruction upon the subject, the trial court erred.
5. **BRANDS—EVIDENCE.**—A brand, although recorded after the commission of the offense, is admissible in evidence, but is not sufficient to prove ownership.
6. **SAME.**—A "road brand," as distinguished from a "range brand," is a brand required by statute to be placed upon cattle before being removed from the county in which they are gathered to market outside of the State, which brand must be recorded in the county from which the cattle are to be driven, and before their removal from such county. The brand introduced in evidence in this case was the "road brand" of the alleged owner which was recorded *after* the cattle were driven from the county

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where gathered, and after the commission of the offense. *Held*, that the said brand was inadmissible to prove ownership, and should have been excluded.

APPEAL from the District Court of Limestone. Tried below before the Hon. Sam. R. Frost.

The conviction in this case was for the theft of one head of cattle, in Limestone county, Texas, on the twentieth day of June, 1886. The animal was alleged in the indictment to belong to D. W. Carrington. The penalty assessed was a term of three years in the penitentiary.

Bill Moss was the first witness for the State. He testified that the defendant was his brother-in-law, and lived with him at his house, in Limestone county, in June and July, 1886. Late in the first, or early in the last mentioned month, the defendant, at the family dinner table, told witness that he was going to kill a beef on that day, and asked if witness wanted any of the meat. Witness replied that he did, and agreed to pay for it, stipulating no price, by crediting the defendant's indebtedness to him for board. Some of the meat was brought to witness's house and was there used, except a small portion which spoiled and was thrown away. Witness left home after dinner, and did not see the killing of the animal, nor did he see the animal before it was killed, nor any part of it after it was killed, except the meat brought to his house. Witness at no time refused to take any of the beef, nor did he tell Mr. Foy that he did refuse it because he wanted to have nothing to do with such beef. He did not tell Foy that defendant had the beef tied in a dugout, and that he refused to help defendant kill it, and told defendant to release it. He only told Foy that part of the meat he got from defendant spoiled, and that he had to throw it away. Defendant said that he was going to kill his own beef.

Henry Foy testified, for the State, that on the morning of the alleged offense, the defendant came to the house of witness's father, called witness to the gate, and told witness that he wanted him to go and help him, defendant, kill a beef. Witness went with him to the open wood near Bill Moss's house, where he found a red two-year-old beef steer tied to a tree. That animal, as near as witness could decipher the brand, was branded N-N on the side. The brand, however, may have been something else very similar to N-N. The defendant killed the steer

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by striking it on the head with an ax. He said that the animal belonged to him. Witness helped to skin, clean and butcher the beef, and afterwards to bury the hide, head, feet and entrails. Witness asked defendant why he buried those parts, but defendant made no reply except that the yearling was his. Three-quarters of the beef were taken to Bill Moss's house, and witness took the other quarter to his father's house. On the way to Moss's from the place of the killing, the defendant asked the witness to say nothing about the killing of the beef or the disposition made of the refuse parts. He then remarked: "If Jim Davis knew about this he would rave." Witness then asked him if the beef belonged to Jim Davis, but defendant did not reply. Witness did not know who owned the animal killed by defendant.

Cross examined, this witness said that he was not quite seventeen years old when the animal was killed by defendant. The witness was not testifying upon the promise of any one to secure his exemption from prosecution for complicity in this offense. He had probably spoken of the case to several parties, but had not discussed the testimony with any one. His father had directed him to tell only the truth about the whole transaction. Witness thought that the defendant owned the animal until after it was slain, when the preparations for the burial of the offal, head, hide and feet were made. Witness helped dig one of the holes in which the said parts were buried. When he got home witness told his father that the defendant had killed a beef which he, witness, did not believe belonged to the defendant. Witness had not been threatened with prosecution in the event he refused to testify in this case. He had been questioned about the case since he was before the grand jury, and he answered the parties. He talked once or twice with Charley Haley about the case, but never to John Lewis. Defendant's brand was 3 diamond c. Witness had never seen a brand of the defendant called a "rolling m." Witness did not tell Bate Parsons that he did not think the brand on the animal was defendant's brand, nor did he tell John Lewis that he thought the brand was W-W. He did not tell Charley Haley that the brand on the animal might have been a "rolling m." Witness was frightened when before the grand jury, never having had that experience before. When the defendant came to get witness to help him kill the beef, he asked witness's father if he did not want some of the beef. Witness's father replied that he had no

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money to pay for it. Defendant replied: "That is all right; if you will let Henry go with me and help skin and butcher it, I will give you one-quarter."

Re-examined, the witness said that he did not know much about Babe Parsons, John Lewis and Charley Haley, except that they were the intimate associates of the defendant. They and defendant were together when witness came out of the grand jury room. At that time defendant asked witness what he told in the grand jury room. Witness replied that he had to tell the truth. Defendant said in reply: "It will learn me not to monkey with children." Witness told Haley that, besides the N-N brand, there was a scar on the animal's hip. Witness was afraid of Parsons, Lewis and Haley, but had never heard of them doing violence to any one.

Bill Moss, recalled for the State, testified that he was a witness before the grand jury which found this indictment. He had a talk with Mr. Alsop, on the road to Kosse, but did not tell Alsop that he saw the beef and hide. The witness saw the place where the beef was killed, which was on the bank of a branch in the field, and about one hundred yards from the house. This was two days after the beef was killed. The ground showed that something had been covered up, but there were no parts of a beef or hide to be seen. There was a little dry blood on the grass. Defendant, after the killing, told witness that he did not bury the head, hide and entrails of the beef. Witness, talking to him about the beef killed, asked him if he had done anything wrong. He replied: "I have killed a beef of my own." He did not say what he did with the refuse parts. Witness did not talk to Henry Foy about the case until after he, Henry Foy, had been before the grand jury. Witness was before the grand jury on the same day. He did not remember whether he talked first to Henry Foy or to Alsop. He had never talked with anyone who claimed to have seen the N-N brand on the yearling, but Henry Foy. Defendant never told the witness the brand of the animal he killed. The wife of the witness pointed out to witness the place of the killing, and the witness, seeing no offal at that place, asked the defendant about the matter. Defendant merely replied that he killed the beef; that it was his own beef, and that he did not bury the offal.

B. F. Foy testified, for the State, that he was the father of Henry Foy. Defendant came to witness's house in June, 1886, and asked witness if he did not want some beef. Witness told

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him that he had no money with which to pay for it. Defendant replied that he would give witness a quarter if he would send his son Henry with him to help butcher the animal. Witness sent his son with defendant, and his son brought a quarter of beef home with him.

W. F. Foy, a son of the last witness, and the brother of Henry Foy, testified, for the State, that some time after this prosecution was instituted, he met the defendant in the "bottom," and defendant told him that he would beat this case; that the yearling was his, and that he could prove the fact by Babe Parsons. Witness had seen the N-N brand on the range. A man from Leon county drove a bunch of cattle in that brand through the neighborhood, and several head of the animals dropped out of the drove. Witness had seen as many as three different animals in that brand on the range.

Sam Alsop testified, for the State, as did the witness W. F. Foy, in regard to the N-N brand, except that he had seen as many as six animals in that brand on the range.

The State here introduced the record of brands of Limestone county, which showed record of the N-N brand in the name of D. W. Carrington, on the sixteenth day of April, 1887. The said D. W. Carrington then testified, for the State, that he lived at Marquez, in Leon county. Early in May, 1886, the witness drove a bunch of cattle from Leon county to Bremond, in Robertson county, for the purpose of shipping them to market. The herd comprised one and two year old beef steers. Witness lost twenty-two head of those animals in Limestone county, between Kosse and Bremond. Some fourteen head of those cattle were eventually recovered by the witness. The animals lost were all in the witness's "road brand," N-N, and most of them had other brands as well. Witness talked to George Lewis and others about getting his cattle for him, and may have given the said Lewis authority to sell. It was the recollection of the witness that he had his said road brand recorded in Leon county. If so, it was recorded before he left the county.

The charge of the court upon accomplice testimony, referred to in the third head note of this report, reads as follows: "The law provides that a conviction for crime can not be had upon the testimony of an accomplice, unless such testimony is corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of an offense. An accomplice,

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within the meaning of the foregoing provision of law, is any one who participates or aids, advises or encourages another in the commission of an offense, or, being present, agrees to the commission of an offense. An accomplice is not an incompetent witness, but a conviction for crime can not be had on the testimony of an accomplice alone, but may be had when there is evidence corroborating the testimony of an accomplice (and whether there is such corroborating evidence is for the jury to determine), provided such corroborating testimony tends to connect the defendant with the offense committed. The corroborating testimony, to be sufficient, must not merely show that the offense was committed, but must show that the defendant committed the offense, or knowingly and purposely assisted in the commission of the offense. Hence it follows that the defendant can not be convicted of the criminal charge against him upon the testimony of Henry Foy alone. But, if you find that the facts testified to by the witness Henry Foy, and all other facts and circumstances in evidence which corroborate him, if any, do corroborate his testimony, establish beyond a reasonable doubt the conclusion that the defendant did kill a steer, the property of D. W. Carrington, without the consent of the owner, and appropriated the same to his own use, under such circumstances as constitute theft of the animal, he is guilty, and you should so say."

The motion for new trial raised the questions discussed in the opinion.

Burrow & Kincaid, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. A fraudulent *taking* of property without the consent of the owner, with the intent to deprive the owner of the value of the property, and appropriate it to the use and benefit of the person taking it, constitutes the offense of theft. Such a *taking* of the property completes the offense. The *factum probandum*, therefore, is such *taking*. It is the main fact in issue. Where the main fact in issue is not directly attested by any eye witness, but is proven as a matter of *inference* from other facts in evidence, the case rests wholly upon circumstantial evidence. (1 Greenl. Ev., secs. 13-13d.; Burrell's Cir. Ev., 4 *et seq.*; *Eckert v. The State*, 9 Texas Ct. App., 105.)

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In this case the evidence shows that, before the alleged stolen animal was killed by the defendant, and before he is shown to have had any possession thereof, or connection therewith, it had been taken from its accustomed range, carried into the field of one Moss, and there tied to a tree. It is evident, therefore, that the theft of the animal by some person had been completed at the time defendant was first seen to have possession of it. But no witness testified to having seen the *taking* of the animal from its range. The fact of such taking is only proved as a matter of inference from other facts in evidence. It is only proved circumstantially, and the case is therefore one resting wholly upon circumstantial evidence. This being the character of the case, it was material error to omit to charge the jury upon the rules relating to circumstantial evidence. We do not think the statements made by the defendant in regard to the animal killed by him can be regarded as confessions proving that he took the animal from its range, or, in other words, proving that he committed the original theft of the animal. They may have the effect to connect him with the animal after it had been tied to the tree in Moss's field, and thus connect him inferentially with the original taking, but they do not afford direct evidence of the original taking, and make this a case not wholly dependent upon circumstantial evidence.

There is no evidence proving the corpus delicti of the alleged theft, except the testimony of an accomplice. He alone saw the animal that was killed and appropriated by the defendant. He alone saw the brand upon said animal. As to this portion of his testimony there is no corroborating evidence. It is only from the testimony of this accomplice that we are informed that the animal killed by the defendant was one of Carrington's cattle, and not the defendant's own property. Can such testimony support a conviction? We think not. Our view of the statute relating to accomplice testimony is that where the corpus delicti of the offense is proved alone by accomplice testimony, such testimony must be corroborated by other evidence tending to establish a commission of the offense, and the defendant's connection with the commission of the same. It will not suffice to corroborate such testimony to the extent only of connecting the defendant with the commission of an act alleged to be an offense. It must be proved that the act committed was an offense, and when this proof is made by an accomplice his testimony must be corroborated.

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In the case before us the offense alleged was the theft of an animal, the property of one Carrington. It was just as essential for the prosecution to prove that the animal taken was the property of Carrington as that it was taken by the defendant. There was ample evidence to prove, and, in fact, it was not denied by the defendant that he took an animal and appropriated it. But the ownership of the animal taken was a vital issue upon which depended the guilt or the innocence of this defendant. There was not a particle of evidence establishing the allegation that the animal killed by the defendant was the property of Carrington, except the uncorroborated testimony of the accomplice witness. We hold, therefore, that the evidence is insufficient to support the conviction. (Code Crim. Proc., art. 741; *Coleman v. The State*, 44 Texas, 109; *Davis v. The State*, 2 Texas Ct. App., 588.)

We are of the opinion that the charge of the court in the particulars excepted to was erroneous. That portion of the charge relating to accomplice testimony which applies the law to the facts of the case, is too broad in its scope. It should have required the corroboration to be as to facts tending to show the commission of an offense, and the defendant's connection with such commission. The charge was also erroneous in instructing that it was the *killing* of the animal that constituted the offense. It was the *taking* of the animal while on its accustomed range, and not the *killing* of it after it had been *taken*, that constituted the theft of the animal. We furthermore think that the court should have submitted the question to the jury as to whether the witness Moss was an accomplice by proper instruction, such as was requested by counsel for defendant.

With regard to the record of brands, while admissible in evidence although recorded after the commission of the alleged offense, they are not sufficient evidence to prove ownership. It further appears, with reference to the brand in this case, that it was a "road brand," and not a range brand. A "road brand" is provided for by article 4632 of the Revised Statutes, and is required to be placed upon cattle before being removed from the county where the same are gathered to market beyond the limits of this State, and said brand is required to be recorded in the county from which the animals are to be driven, and before their removal from such county. This statute is not operative in certain named counties, the county in which this prosecution is conducted being exempted now from its operation (act March 21,

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1887, 34); but it does not appear to have been so exempted at the time of the commission of the alleged offense. (Act April 12, 1883, p. 79.) It seems to us that the record of the "road brand" of Carrington, made *after* his cattle were driven from the county where gathered, and after the commission of the alleged offense, was unauthorized by law, and that said record was not only insufficient, but was inadmissible evidence to prove ownership.

Because of the errors discussed, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered December 10, 1887.

No. 2749.

TOM WILLIAMS v. THE STATE.

THEFT—EVIDENCE—FACT CASE.—As tending to establish identity in developing the *res gestæ*, or to prove guilt by circumstances connected with the theft, or to show the intent of the accused with respect to the property described in the indictment, it is competent for the State to prove the theft by defendant of other property at the same time and place of the theft in question, but it is not competent to prove a distinct theft committed by defendant at another time and place. See the statement of the case for evidence of distinct thefts *held* to have been erroneously admitted.

APPEAL from the District Court of Lamar. Tried below before the Hon. D. H. Scott.

The conviction in this case was for the theft of a pistol of the value of twenty dollars. The penalty assessed against the appellant was a term of two years in the penitentiary.

H. S. Bettes was the first witness for the State. He testified that he was the junior member of the hardware firm of Hicks & Bettes, doing business in the city of Paris, Lamar county, Texas. Witness knew the defendant as Tom Williams. Some time in December, 1886, Deputy Sheriff J. A. Booth summoned witness to the court house in Paris to examine certain goods supposed to be stolen property. Witness repaired to the sheriff's office and there found displayed a large quantity of articles, con-

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sisting principally of wearing apparel for men, women and children, shoes, socks, stockings, etc. Among the stock displayed he also saw a barrel of bottled beer, some soap, crackers, a Winchester rifle, four pistols and a box of cartridges. Among the pistols referred to was a Smith & Wesson double action forty-five calibre revolver, which the witness identified as the property of Hicks & Bettes. Some time during the summer or fall of 1886, Mr. Hicks took the said pistol from the store to his house, where he kept it for some time. When he brought it back to the store, he called the witness's attention to a small rust spot on the handle plate. The pistol was then placed in the show case, where it remained until it was taken away by some one. The witness did not remember observing the pistol after it was put back in the show case as stated, until he saw it among the articles exposed to view in the sheriff's office. The pistol witness saw in the sheriff's office was, to the best of the witness's belief, the pistol which Hicks took from the store to his house and afterwards brought back to the store. On the corresponding part of the handle plate it had a rust spot similar in shape and size to that on the pistol which belonged to Hicks & Bettes, and the pistol was of the same make, calibre and finish. Witness could not identify either of the other pistols as the property of his firm, but they were of the same patterns, calibre, make and finish of weapons carried in stock by his firm. The pistol identified by the witness as the property of his firm was not sold by witness to the defendant, nor did he give it to the defendant, nor did he consent that defendant should take it, nor that anybody else should take it. It was taken without the consent of the witness sometime in the fall of 1886, from the witness's store in Paris, Lamar county, Texas. The cash market price and value of the pistol was twenty dollars. Witness identified, at the same time he identified the pistol involved in this prosecution, other articles belonging to Hicks & Bettes, including three other pistols, some knives and forks and a saw, and had them taken back to the store.

On his cross examination, the witness said that his firm had seven or eight salesmen employed. He did not miss the pistol, nor know that it had been taken, until he found it in the sheriff's office as stated, and did not know when it was taken. He did not know of his own knowledge whether or not the said pistol was sold to any one by any of his clerks. Hicks called witness's attention to a rust spot on the handle plate, when he returned

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the pistol to the store—his evident purpose being to ascertain whether it affected the pistol's commercial value. Witness replied that it did not impair the value in the least, and he put the pistol in the show case.

G. F. Hicks testified, for the State, that he was the senior member of the hardware firm of Hicks & Bettes. Some time in the summer of 1886, the witness took home from his store a certain silver mounted, double action, forty-five calibre Smith & Wesson pistol. He kept the pistol at his house for some time, and then took it back to the store. When he went to put it in the show case with other pistols, he observed a peculiar small rust spot on the handle plate of the said pistol, to which he called the attention of his partner, Bettes, and asked if it injured the commercial value. Bettes replied that it did not, and placed it in the show case with other pistols. Witness had no recollection of seeing that pistol again until he was called to the court house to examine a large quantity of supposed stolen goods found in the defendant's house by Deputy Sheriff Booth. He then saw the pistol described in the indictment, and identified it by the rust spot as the property of Hicks & Bettes. Among the other articles, witness identified a hand saw and a box of cartridges, by private price mark, as the property of his firm. A Winchester gun, three other pistols, and some knives and forks, corresponding with articles of the kind carried in stock by witness's firm, but not otherwise identified by the witness, were taken by Hicks & Bettes as their property, and were sent back to their store. Witness never sold the pistol described in the indictment to any one, nor did he consent that any one should take it. He knew the defendant, who was sometimes about his store, until he issued orders that defendant should be kept out of that establishment. Witness did not know when the pistol was taken from his store. He did not personally know that it was not sold by some one of the clerks.

J. L. Terrell testified, for the State, that he was a dry goods merchant, and, in 1886, did business in the city of Paris, Lamar county, Texas. Some time in December, 1886, witness was summoned to the court house in Paris, to examine certain goods held there by Deputy Sheriff Booth as goods taken from the defendant's house as stolen property. Witness identified about sixty-five dollars worth of dry goods, mostly broken suits of clothing, as having belonged to him, the said goods still having his price mark on them. A short time before the arrest of the defendant,

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witness observed that some of the clothing he had in stock had been suit broken. He reprimanded his clerks for selling clothing in broken suits, and each of them denied having done so. Witness did not sell the goods described to the defendant, nor did he consent for the defendant to take them.

R. F. Scott testified, for the State, that, at the same time Hicks & Bettes recovered their pistols, etc., at the court house, he recovered a barrel of bottled beer, which he knew by the private mark to have belonged to him at one time. He never sold that or any other barrel of beer to the defendant, nor never consented for the defendant to take it. He did not know when the said beer was taken from his store, nor by whom. Witness's warehouse was burglariously entered a night or two before the arrest of the defendant. Witness kept his beer in the said warehouse. The ruling of the court relates to the testimony of this witness and that of the witness Terrell.

J. A. Booth testified, for the State, that he was deputy sheriff of Lamar county in December, 1886. On the fifteenth day of that month, he went to the house of the defendant, in the city of Paris, and searched it for stolen goods. He found about three hundred dollars worth of general merchandise stored away and secreted about the defendant's premises; some under his floor and hearth, some in his trunk, some in his loft and some in his stable. Those articles were taken to the court house, where they were examined, claimed and recovered in parts by Hicks & Bettes, J. L. Terrell and R. F. Scott. The pistol described in this indictment was found by the witness between the mattresses on the defendant's bed.

Eli Taul testified, for the State, that very early on one morning, a short time before the arrest of the defendant, he saw the defendant's wagon at the defendant's back door. There were two bottled beer barrels then in the said wagon.

The State closed.

George Hart testified, for the defense, that on or about December 21, 1885, he, defendant and Jesse Hendricks boarded the train at Paris to go to Dallas. Deputy Sheriff Booth was on the same train. At Sherman, in Grayson county, Mr. Booth put the officers on the crowd for carrying a pistol, which the defendant then had. That pistol was a Smith & Wesson, double action, forty-five calibre pistol, and was "broken on top." Defendant gave the said pistol to the witness on the train, and witness placed it in his valise and took it with him to Dallas. He remained at

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Dallas several days, when he returned to Paris and pawned the said pistol to the porter in L. C. Clark's saloon for two dollars and fifty cents. Frank Jones, the said porter, placed the said pistol behind the counter. The pistol mentioned in this indictment was here shown to the witness, who said it was similar and very like the pistol he got from defendant in the manner and at the time stated, but he could not positively identify it as the same.

Jesse Hendricks testified, for the defense, that he was on the train when Mr. Booth got after the defendant about having a pistol on his person. Defendant gave that pistol to George Hart, who took it in his valise to Dallas, where witness last saw it. That pistol was a Smith & Wesson, double action, forty-five calibre pistol; it was slightly broken on top, and had a small rust spot on the side, between the handle and the barrel. The pistol in evidence, claimed as the property of Hicks & Bettes, is very similar to and looks like the pistol given by defendant to Hart, but witness could not swear that it was the same.

Frank Jones testified, for the defense, that some time in December, 1885, or January, 1886, George Hart came into Clark's saloon in Paris, where witness was then working, and pawned to the witness, for two dollars and fifty cents, a certain Smith & Wesson double action, forty-five calibre pistol. That pistol had a small broken place on top. Witness put that pistol behind the counter, where it remained for several days, when defendant came to the saloon and claimed and demanded the pistol. Witness refused to let him have the pistol unless he paid the two dollars and fifty cents loaned on it. Defendant then left, but soon came back with Hart, who directed witness to let defendant have the pistol on the payment of the money, as the pistol was one which the defendant owned, and loaned to him while en route to Dallas in December, 1885. Defendant paid the two dollars and fifty cents and got the pistol. That pistol very much resembled the one in evidence, being of the same make, size and action, but witness could not say that it was the same.

L. C. Clark testified, for the defense, substantially as did the witness Jones.

Elias Young testified, for the defense, that he knew a certain Smith & Wesson double action, forty-five calibre pistol, which the defendant owned in December, 1885, and which he usually kept between the mattresses on his bed, and which he took with him on his trip to Dallas in December, 1885. The pistol in evidence looked very like the said pistol owned by the defendant in

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December, 1885. Defendant's pistol had a small scratch or rust spot on the right side of the handle.

J. A. Booth testified, for the defense, that he went to Sherman in the fall of 1885 on the same train with defendant, Hendricks and Hart. He thought some of that crowd had a pistol, and so informed the officers at Sherman.

The defense closed.

H. B. Birmingham, county attorney of Lamar county, testified, for the State, in rebuttal, that he was present on a former trial of this cause, and heard the witness Elias Young testify on that trial. He did not, on that trial, say anything about a scratch or rust spot on the handle of the defendant's pistol.

No brief for the appellant has reached the Reporter.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. For the purpose of establishing identity in developing the *res gestæ*, or to prove guilt by circumstances connected with the theft, or to show the intent with which the accused acted with respect to the property for which he is on trial, it is competent for the State to prove the theft of other property at the same time and place of the theft of the property in question. (Willson's Texas Crim. Laws, sec. 1295.) But evidence of distinct thefts committed at other times and places than the theft in question is not relevant, and is inadmissible. Such evidence does not serve legitimately to throw any light upon the particular theft for which the defendant is on trial. (*Gilbraith v. The State*, 41 Texas, 567; *Ivey v. The State*, 43 Texas, 425; *Kelley v. The State*, 18 Texas Ct. App., 262; *Alexander v. The State*, 21 Texas Ct. App., 406.)

In this case, evidence tending to prove that other distinct thefts than the one for which defendant was on trial had been committed by him at different times and places, was admitted over his objections. This was material error, well calculated to injure the defendant, and because of such error the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered December 10, 1887.

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No. 2739.

HENRY STEWART v. THE STATE

1. **PRACTICE—BILLS OF EXCEPTION**, unless filed during the term or within ten days after the expiration of the term of the lower court, will not be considered by this court on appeal.
2. **THEFT—FACT CASE.**—See the statement of the case for evidence held insufficient to identify the animal traced to the possession of the accused as the alleged stolen animal described in the indictment, and, therefore, insufficient to support the conviction for theft.

APPEAL from the District Court of Hopkins. Tried below before B. W. Foster, Esq., Special Judge.

This conviction was for the theft of a cow, alleged in the indictment to be the property of Mrs. Mary Stewig, in Hopkins county, Texas, on the first day of September, 1886. The penalty assessed against the appellant was a term of two years in the penitentiary.

Mrs. Mary Stewig was the first witness for the State. She testified, in substance, that she was well acquainted with the defendant, and knew him in 1886. During the said year the witness owned a certain red cow that had some white about the back, and the brush of whose tail was white. That animal was marked with a smooth crop off the left ear. She ranged up and down on both sides of Turkey creek, about two miles from the witness's house. Witness did not know, but thought that range was in Hopkins county. She did not know the location of the Hopkins and Hunt county line, nor that Turkey creek formed that line. Witness lived about a mile from Turkey creek. The said cow habitually came home at night until about three weeks before Christmas, 1886, when she disappeared from the range. Witness recovered her cow in March or April, 1887, through the depot agent at Lone Oak. Mr. Cardle went to Lone Oak for witness and brought the cow to witness's house.

On her cross examination the witness stated that she did not know whether the range of the cow was in Hopkins or in Hunt county. She did not know where the county line ran. The defendant was prosecuted in the district court of Hunt county for

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the theft of this same cow, and the witness testified against him on that trial. He was acquitted on that trial. The witness had known the defendant a long time. He had always sustained a good reputation for honesty and fair dealing, and the witness did not believe that he stole her cow.

Tom Cardle testified, for the State, that he and the daughters of Mrs. Stewig went to Hunt county to get the cow alleged in the indictment to have been stolen. They found the cow in a pasture near Lone Oak, in the possession of one Greeney, who was the railroad agent at the Lone Oak depot. Witness applied to Mr. Campbell for the cow, and Campbell told him to go to the pasture and get her. Witness knew the cow he got to belong to Mrs. Mary Stewig, and he knew that the range of that cow was in Hopkins county. On his cross examination, the witness said that he did not positively know the location of the Hopkins and Hunt county line, but thought it was about two miles from Turkey creek. Mrs. Stewig lived about a mile and a half from Turkey creek. The defendant, at the time Mrs. Stewig's cow disappeared from the range, was working at a mill in the neighborhood. One Bill Roberts left the county about the time Mrs. Stewig's cow disappeared. Defendant, who had always sustained a good character for honesty, remained in the neighborhood. When witness applied to Campbell for the cow, he, Campbell, said nothing about defendant, but cursed Bill Roberts as the "d—d thief who stole the cow and sold it to him." Witness told Campbell that Greeney would not surrender the cow unless he, Campbell, paid the money due him. Campbell then told witness to tell Greeney that it was all right, and that he would pay the money. The cow recovered by the witness was marked with a smooth crop off the left ear, and belonged to Mrs. Stewig. Witness did not believe that defendant took the cow, or that he was in any way connected with the theft.

Will Campbell testified, for the State, that during the fall of 1886 he bought a cow from one Bill Roberts. That cow was turned over to Bill Roberts, in the Turkey creek bottom, by the defendant. Defendant did nothing more than ride up near the cow and say to Roberts: "That is the cow I let you have." Roberts helped the witness drive the cow to the pasture. The cow turned over to Roberts by the defendant, and that was sold to witness by Roberts, and which he and Roberts drove to pasture, was marked with a split on the under part of one ear. Neither

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of the ears was smooth cropped. Of that fact the witness was absolutely positive. She had no white on her tail.

On cross examination, the witness said that he could fix the time of the purchase of the cow from Roberts no more definitely than that it was in the fall of 1886. Witness bought the cow from Bill Roberts, and not from defendant, paying Roberts for it a certain watch which Roberts had long wanted to buy. Witness met Roberts in the town of Lone Oak on the morning of the purchase. Roberts then offered to give witness a cow for the watch, and witness agreed to the exchange. They then procured horses, got with the defendant and went to Turkey creek bottom. From a point on the road, in the bottom, defendant pointed to the animal described by witness, and said to Roberts: "Yonder is the cow." Roberts and witness then took the cow to the pasture and turned her in. Witness denied that he told Cardle, when the latter came after the cow, that he would pay Greeney for the cow, and he had never paid him. Roberts remained in the Lone Oak neighborhood for several days after the cow was taken away, and then he left. He said nothing about giving the watch back to the witness, nor did the witness try to get it back. Roberts was finally arrested, and was now in the penitentiary.

Simon Lassiter testified, for the State, that during the fall of 1886 the defendant, at his, witness's, house, told him that the cow he sold Roberts was all right, and afterwards told him the same thing in the town of Lone Oak.

On his cross examination, the witness said that he had no particular ill will towards the defendant. He and defendant quarreled once, but became reconciled afterwards. Witness was married to the sister of Bill Roberts. Witness heard about the arrest of Roberts for the theft of this cow. He could not now say when the said Roberts was last at his house before his said arrest. Roberts and witness, at the time the latter was charged with the theft of this cow, were not on good terms, and had not spoken to each other for some time. They afterwards became reconciled, and were now on good terms.

Jim Howerton testified, for the State, that the reputation of the witness Campbell for truth, veracity and honesty was good.

The motion for new trial raised the questions discussed in the opinion.

Petee & Crosby, for the appellant.

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W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. None of the bills of exceptions contained in the record can be considered, for the reason that they were not filed within ten days after the conclusion of the trial. (*Shubert v. The State*, 20 Texas Ct. App., 320.)

Mrs. Mary Stewig, the owner of the alleged stolen cow, describes the animal as a red cow, with some little white on her, marked with a smooth crop off her left ear. She states that the cow had some white across her back, and that the bush of her tail was white. Witness missed the cow from her range in December, 1886, and recovered her in March or April, 1887. Mr. Tom Cardle went after and brought back the cow to the witness. Tom Cardle testified that he recovered the cow described by Mrs. Stewig in Hunt county, from the pasture and possession of one Greeney. He describes the cow as being marked with a smooth crop off the left ear, and testified positively that it was Mrs. Stewig's cow, he being well acquainted with said cow.

It is not shown by the evidence that the defendant had any connection whatever with the theft of this particular cow. The only evidence in the record which connects the defendant with *any* cow relates to a different animal—to a cow which he traded to one Bill Roberts, and which Roberts traded to one Campbell. This last mentioned cow had no crop off either ear, but was marked with a split in the under part of one ear, and she had a red tail. As presented to us, the evidence entirely fails to identify the cow traded by the defendant to Roberts as Mrs. Stewig's cow, but on the contrary, shows that they were two different animals.

Because the conviction is not sustained by the evidence, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered December 10, 1887.

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No. 2714.

JOHN FIELD v. THE STATE.

BURGLARY—POSSESSION OF RECENTLY STOLEN PROPERTY—FACT CASE.—

To warrant an inference of guilt of theft from the circumstance of possession of recently stolen property, such possession must be personal and exclusive; must be unexplained, and must involve a distinct and conscious assertion of property by the defendant. See the statement of the case for evidence which, under this rule, is *held* insufficient to support a conviction for burglarious theft.

APPEAL from the District Court of Taylor. Tried below before the Hon. T. H. Conner.

The conviction was for the burglary of the store house of Leon Caperon, in Taylor county, Texas, on the twelfth day of February, 1887, and the penalty assessed against the appellant was a term of two years in the penitentiary.

Leon Caperon was the first witness for the State. He testified that, on February 12, 1887, the day alleged in the indictment, he was engaged in the wholesale and retail grocery business in the city of Abilene, Taylor county, Texas. On the night of the day mentioned, which was Saturday, some party or parties broke into the witness's store house, in which he conducted the said business. Witness learned of the burglary at about eight o'clock on the next day, Sunday. Two or three sacks of flour, four boxes of cigars and some hams were taken from his said store by the burglar or burglars. They also took a case containing three or four dozen pint bottles of beer. Of the cigars taken, one box was of the Mandoline brand, and the other three of the La Fortuna brand. The four empty cigar boxes now shown the witness were of the said brands, and the witness supposed that the said boxes were his. The witness had "handled" the said brands for some time, and had sold a great many, but not of the shipment last received. Gus Ackerman was the only other merchant in Abilene who sold the La Fortuna brand, and he bought his supplies of the said cigar from the witness. The flour taken was of the Ruby brand. The defendant had worked about the witness's store, and was familiar with the premises. The house

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was entered at the rear door by prying off the hook which secured it on the inside.

On his cross examination, the witness said that he was well acquainted with George Field, who worked about witness's store for three years as porter. Witness discharged the said George about three weeks before the burglary, for inattention and intoxication, and because, having missed various articles of small value, he became suspicious of George's honesty. Witness did not know who burglarized his store and took his goods. He could not say defendant was the guilty party, nor could he say that George Field was not. Some beer was taken from tap at the same time the other things were taken. The house was entered and the goods taken without the consent of witness.

R. E. Burch testified, for the State, that he learned of the burglary of Caperon's store on Monday morning after it happened. The fact was reported to him by Mr. Poot. Witness went at once to the defendant's house, which he found closed and no one at home. He entered the said house through a window, which he opened, and found two cigar boxes, one being half full and the other full of cigars. The half full box was in a safe and the full box was on the safe. He also found a barrel well filled with flour, and a recently emptied flour sack lying near it. He did not remember the brand on the flour sack. Witness went back to the defendant's house in the afternoon, and found the defendant's wife and her brother, one Lige Green. Witness could not then find the sack, nor could he learn anything of it by inquiry. On his way back to town from defendant's house, in the morning, the witness met and arrested the defendant. Defendant then had a cigar in his pocket, which looked like, and which witness took to be, a La Fortuna cigar. Two of the cigar boxes exhibited are the two taken by the witness from the defendant's house on his first visit in the morning.

On his cross examination, the witness stated that he was present at the examining trial of the defendant. Defendant had no counsel on that trial. He made a statement, which was reduced to writing by County Attorney Hardwicke. Just after the witness went to the house of the defendant, in the morning, he went to the house of George Field. He found in a trunk in George Field's house an empty Mandoline cigar box, the same now exhibited in court. When witness first went to the house of the defendant, as stated in his direct examination, he saw a large number of empty beer bottles about the yard. Defendant's

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house was about seven blocks distant from Caperon's store. Defendant's examining trial was had on the Tuesday following the burglary.

Rube Peyton was the next witness for the State. He testified that he was in Mr. Caperon's employ on the twelfth day of February, 1887. His duties were to attend to the beer department and open and close the store. He generally closed at dark and opened at daylight. Witness remembered closing the doors on the night of the burglary, particularly by the fact that he swept some flour dust out of the back door just as he closed and hooked it. He came to the store about daylight on Sunday morning and found the back door open and tracks leading into the store. It had rained during the night, and the feet of the burglar or burglars took mud into the store and left moist mud impressions. Witness could not tell whether the several impressions he saw inside the store were made by the feet of one or more men. Some of those tracks led into the store cellar. Witness missed four or five sacks of flour of the Ruby brand, several hams and a case of beer. He missed no cigars, but did not examine the stock of cigars. The tracks indicated the presence of more than one man, but may have been made by a single person making several trips into and out of the store.

On his cross examination the witness said that he had been in Caperon's employ six or eight months. Witness missed no beer from the vault. If there was any beer on tap the witness did not know it. Witness knew the amount of flour gone from the fact that but five sacks were in stock when he closed at night, and none were in the store on Sunday morning. George Field was in Caperon's employ when witness first entered his service, and the said George Field often assisted witness in closing the store and securing the doors. He was therefore perfectly familiar with the fastenings of the doors. George Field was discharged by Caperon about a month before the burglary. Defendant was also familiar with the arrangement of the store, and had worked about it a few times. The only time that witness ever found the store door open was on the morning after the burglary.

Gus Poot testified, for the State, that he was book keeper for Caperon at the time of the burglary. Witness came to the store about half past eight o'clock on Sunday morning, when Rube Peyton called his attention to the indications of burglary. Upon examining the stock witness missed a case of beer and

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some cigars. He had arranged the cigars on the Saturday evening before; and could readily tell what boxes were gone. The only disposed of box out of the late shipment of the La Fortuna brand of cigars was a box sent by witness to a friend in El Paso. One box of Mandoline and two boxes, at least, of the La Fortuna had been stolen. No dealer in Abilene handled the La Fortuna except Ackerman, and he bought his supplies from Caperon.

R. E. Burch was recalled and testified, for the State, that he was present, as constable, at the examining trial of the defendant before Justice Dougherty, and heard the justice tell defendant that he was at liberty, but could not be required, to make a statement, and that, although the statement could be afterwards used against him, it could not be used in his behalf. Defendant then made a voluntary statement which was written down by Mr. Hardwicke, and attested officially by the justice. Witness identified the instrument in writing (here offered) by the hand writing of Hardwicke, by the contents, and by the certificate and signature of the justice. That instrument, being the voluntary statement of the defendant, reads (the caption omitted) as follows: "I don't know anything about the matter. George Field brought the cigars to my house last Thursday morning, I think. I am not certain about the time. I think, though, it was last Thursday morning. He said he had been up to Colorado City and brought the cigars down from there with him when he came. I don't know anything about any flour. If George Field got any flour I don't know anything about it. When George Field quit working at Leon Caperon's—a day or two after he quit—he went up to Colorado City. He stayed away three or four days about that time, and when he came back he brought the cigars with him."

Lucy Smart testified, for the State, that on Sunday morning—the morning after the burglary—at about seven o'clock, she met George Field on his way to clean up a saloon. He gave witness some oysters, and asked her to cook them for him. At about eight o'clock, he and Rich. Rogers came to witness's house and ate breakfast.

On her cross examination, the witness denied that she ever told W. H. Woodruff that she wanted him, Woodruff, to testify that George Field stayed at her house on the night of the burglary. The witness made no attempt to get Woodruff to so testify. She made no attempt to get Bob Fisher to testify that George Field stayed at her house on the night of the burglary.

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Rich. Rogers testified, for the State, that he and George Field ate breakfast at Lucy Smart's house on the morning after the burglary. Thence they went to the defendant's house and ate another breakfast.

Lou Johnson testified, for the State, that George Field came to her house on the night of the alleged burglary, at about ten o'clock, and went to bed. He came to witness's house alone, and went to bed in the front room. Witness went to bed in the back room. When she got up next morning, George Field was gone.

Cross examined, the witness said that she was the oldest female resident of Abilene, and was known as "Prairie Dog Lou," from the fact that she built her first house over a prairie dog hole. George Field did not sleep with the witness on the night of the burglary, nor in the same room with her. He had never before stayed at witness's house over night. He said nothing more when he came to the house than that he wanted to stay all night. The room in which George Field slept was connected with the witness's room by a door. George Field was in the front room when witness went to sleep, but witness did not know how long he remained in the room.

The State closed.

W. H. Woodruff testified, for the defense, that, on the day after George Field was arrested for the burglary of Caperon's store, Lucy Smart came to witness's house and tried to get him to testify that George Field stayed at her house throughout the night of the alleged burglary. She also tried to get Bob Fisher to testify to the same effect. Witness declined to testify as she requested.

Minnie Field, the wife of the defendant, was his next witness. She testified that she had a vivid recollection of the reported robbery of Mr. Caperon's store. She was cooking for Mr. Roberts at that time. Defendant came to Roberts's house about dark on that Saturday night and escorted the witness home. They reached home about eight o'clock, talked awhile, and then went to bed, occupying the same bed. The witness knew, as a positive fact, that defendant did not leave his bed at home during that night. George Field and Lige Green were then staying at the witness's house, and occupied a bed in another room. When George started to bed, he told witness that he wanted to get up early on the next morning. When the clock struck five on the next morning, witness called George Field, but he was gone. Lige said that he had left the house a few minutes before witness

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called him. Witness and the defendant slept late on that morning, and when defendant got up he went to Mr. Roberts's house and cooked the breakfast in the stead of the witness. He returned about eleven o'clock, and soon went back to Mr. Roberts's and got the dinner. He came home after dinner, and he and witness spent the rest of the day at home. Witness spent that day at home because she was sick. Witness knew nothing about the cigars being in her house until George Field, after his arrest, sent for her. She went to the jail to see him. He then told witness that he took the cigars to her house, and asked witness to go to see Mr. Caperon for him. Witness did not know who put the flour in the barrel. The barrel contained some flour brought there from Fort Worth, and George Field put in some more about a week before his arrest. Witness had not been staying at home recently, and had done no recent cooking at home—consequently she knew little about the kitchen. George Field brought some cigars to witness's house when he returned from Colorado City, about a week before the burglary, and, on the Sunday morning after the burglary, he and defendant and Lige Green smoked some of them in the house. It was on that morning that the witness first saw the cigar boxes now in evidence. About five o'clock, on Sunday after the burglary, George Field brought a sack of bottled beer to the witness's house. He brought it from his own house. No one saw him but the witness.

On her cross examination the witness said she was brought to the court from jail, where she was confined on a charge of taking a file to the defendant in jail. She was also in custody under a charge against her in the Federal court at Dallas, of taking a letter from the post office which did not belong to her. That letter was addressed to John Field. Witness got it from the post master at Fort Worth, and thinking it was meant for her husband, she took it to him at Abilene. That letter contained a post office order for four dollars and fifty cents, which witness afterwards gave to the post master at Fort Worth. When witness was tried before the United States commissioner, the said letter was lost, but had been found since.

The motion for new trial raised the questions discussed in the opinion.

M. A. Spoonst, for the appellant. •

Syllabus.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. There is not sufficient evidence before us to sustain this conviction. Conceding that the proof that the articles found at defendant's house were a portion of the property which had been stolen from the burglarized house, said articles were not found in the personal and exclusive possession of the defendant, nor did he claim the same as his property. We fail to find any other evidence in the record which tends with any cogency to prove defendant's guilt. To our minds the evidence falls far short of establishing the guilt of the defendant with that degree of moral certainty which excludes every other reasonable hypothesis.

To warrant an inference of guilt of theft from the circumstance of possession of recently stolen property, such possession must be personal and exclusive, must be unexplained, and must involve a distinct and conscious assertion of property by the defendant. (Willson's Texas Crim. Laws, sec. 1299.) No such possession is shown by the evidence in this case.

Because the evidence does not sustain the conviction the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered December 10, 1887.

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No. 2592.

EX PARTE R. D. BELL.

1. LIQUOR TRAFFIC—SALOONS—LEGISLATIVE POWER.—The Legislature of this State has the power to absolutely prohibit drinking saloons, or saloons to be used in the pursuit of the liquor traffic. This power carries with it the power to regulate the mode and manner, and the circumstances under which such saloons may be conducted, and to surround the right with such conditions, restrictions and limitations as it may deem proper. Under this rule the act of the Legislature requiring the execution of a bond as a condition precedent to the granting of a license to conduct a drinking saloon is constitutional. See the opinion on the question.
2. SAME.—Relator was charged with the offense of pursuing the occupation of a retail liquor dealer without having complied with the license laws.

Opinion of the court.

The application for the writ of habeas corpus alleges the refusal of the relator to execute the bond required by law, and prays for relief upon the ground that the conditions of the bond are unconstitutional. *Held*, that the conditions of the bond can not be inquired into in a proceeding of this character, the bond never having been executed; and that the constitutionality of the conditions can be impeached only in a proceeding to enforce the penalties for their infraction.

ORIGINAL APPLICATION to the Court of Appeals for the writ of habeas corpus.

The entire case is disclosed in the opinion, which, though it was delivered on the fifteenth day of October, 1887, was held up by a motion for rehearing, which was not disposed of until the tenth day of December, 1887. The briefs of the counsel for the relator and the State are both able and exhaustive, but are necessarily too long for insertion in this report, and can not, in justice to their authors, be summarized.

F. G. Morris, for the relator.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Relator in this proceeding makes original application to this court for the writ of habeas corpus, alleging that he is illegally restrained of his liberty, and praying that upon a hearing of the same he may be discharged from custody. A succinct statement of the case is made in the brief of his counsel as follows:

"This is a prosecution under section 8 of an act of March 29, 1887 (Gen. Laws, 1887, pp. 58-61), amendatory of former acts regulating the sale of spirituous and other intoxicating liquors. The applicant being a seller of malt liquors, is charged by information by the county attorney of Travis county, with failing to post up in any conspicuous place in his place of business the license required to be issued by the county clerk, and is held in custody under a *capias* issued on this charge. The applicant admits the truth of the charge, but avers that he is illegally restrained in his liberty because there was no legal method provided by law whereby he could obtain any such license, and that he did not, for this reason, have any such license to post up. He maintains that while the law under which he is prosecuted provided for the issuance of such license, yet only upon conditions

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which the Legislature had no constitutional authority to require of him, to obtain whatever license the Legislature had a right to require him to take out before pursuing his occupation; that said law required him to give a bond, with sureties to be approved by the county judge, in the penal sum of five thousand dollars, with numerous conditions, and forbid the county clerk from issuing said license, and the citizen from pursuing said occupation, unless said bond was given. He believes the Legislature had no constitutional authority to require said bond, and that the law requiring the same is unconstitutional and void."

Objections to the bond are two fold; first, that it can not be required at all; and secondly, that the statutory conditions which it is required the bond shall contain are such as are not authorized, and are in violation of constitutional rights and guarantees.

Now, it is to be noted that applicant has never given the bond, and is not seeking relief from the enforcement of penalties for its violated conditions or any one of them. His refusal absolutely to give the bond is the cause of his troubles.

We do not propose to enter upon a discussion of the liquor traffic in its relations to society and to government, because, in our view of the case here presented, such discussion is unnecessary. Nor do we propose to discuss the scope, extent and purpose of "local option," as provided in our Constitution and laws, nor how far it is to be considered exclusive as a prohibitory law in our State. In fact, we do not propose to discuss generally prohibitory legislation at all; because, in our view of the case, prohibition in one of its aspects alone is involved in the matters submitted, and that is the right and power of the Legislature to prohibit "drinking saloons" or saloons for the purpose of carrying on the liquor traffic.

Upon the question of this power in the Legislature we have found no difference of opinion, either in the decisions of courts or the standard authorities upon the subject. All agree that the Legislature has authority absolutely to prohibit them. If it can prohibit them entirely, then it follows inevitably as a corollary that it can regulate the mode, manner and circumstances in and under which they may and shall be conducted and carried on, and may surround the right with such conditions, restrictions and limitations as may appear judicious.

Mr. Cooley says: "Within certain limits, which can not with accuracy be conclusively defined, the State must always be at

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liberty to determine what are lawful employments, and to make others unlawful by forbidding them. * * * The assumption supporting such prohibitions is that the employments forbidden are hurtful and demoralizing; and they are prohibited in the exercise of legislative discretion which is subject to no extraneous control. Passing from the cases of prohibition, we find that the authority to regulate business embraces every class and variety of occupation, and that it may be exercised either in respect to the persons who may follow or be employed in the business, or as to the methods in which the business may be conducted, or both. * * * And where an occupation is peculiarly susceptible of abuse, it may be proper for the State to surround it with special restrictions, and require those who propose to enter upon it to take out special license and give security for good behavior, and to refuse altogether to issue licenses to persons of known bad character. Such regulations are usually made for the cases of hackmen, saloon keepers, proprietors of billiard halls, of theaters, shows, etc. The final test of what is a reasonable regulation must be found in the legislative judgment, unless the Constitution has provisions on the subject. What the Legislature ordains and the Constitution does not prohibit must be lawful." (Cooley on Torts, 276; Cooley's Const. Lim., 4th ed., 727-729, 713.)

Mr. Tiedeman says: "The suppression and control of the public disorders caused by the keeping of saloons constitute a heavy burden upon the tax payer, and the cause of them may be removed by a prohibitory law, or restrained and restricted in number by the imposition of a high license, according as it may seem best to the law making power. As matter of course, if the absolute prohibition of drinking saloons is constitutional, it would be lawful to subject them to more or less strict police regulations, where the regulations have for their reasonable object the prevention of some special evil which the prosecution of the trade threatens to the public." (Tiedeman on Lim. of Police Power, 309, 310.)

It can not be questioned but that one taking out a license to engage in the traffic of liquor can be required to keep an orderly house. He can be required to give bond with securities that he will keep an orderly house, and a violation of the conditions of his bond will not only subject him to a criminal prosecution but also to a civil action for damages on the part of those injured by his failure to comply with such conditions. This doctrine

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was held by our Supreme Court in *Goldsticker v. Ford*, 62 Texas, 385, which was a suit to recover the penalty upon the bond of a retail liquor dealer under provisions of an act approved April 4, 1881 (Gen. Laws, Reg. Sess., 17th Leg., page 113), which in its fourth section, stipulating the conditions of said bond, is in many respects identical almost with the conditions complained of as provided for the bond in the case we are considering.

But there is another position taken in this case which demands our notice, and it is in substance that if it be conceded that the State has the right to regulate saloons, and as part of the regulation to require a bond as a condition precedent to the granting of the license and the prosecution of the business, still it has no right to and can not require a bond with conditions some of which, it is claimed, are invalid and unconstitutional. This is a question which we do not think applicant can be heard or permitted to raise, nor do we feel called upon to decide it on the petition for habeas corpus as presented in this proceeding. It is stated in the petition that applicant refuses to execute the bond, the main objection being that the State has no right to exact of him the execution of any bond. Now he may never execute the bond and the matters he complains of may never occur in so far as he is concerned. Under such circumstances we do not feel called upon to decide them until a case properly arises in which they are properly involved. Had applicant executed the bond, and its penalty was being sought to be enforced against him for a violation of some one or all its conditions, then, indeed, he might be in an attitude to claim that we should determine the validity of these conditions. On the case he here presents, he is not entitled to have these questions which may never arise, decided in advance of his execution of said bond.

Our conclusion is that upon his case as presented, applicant is not illegally restrained of his liberty, and his application for the writ of habeas corpus is therefore refused.

Writ refused.

Opinion delivered October 15, 1887.

Rehearing refused December 10, 1887.

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No. 2629.

HENRY SHAMBURGER v. THE STATE.

1. **PRACTICE—EVIDENCE—JURISDICTION** is a question addressed to the court alone, and is not a subject for the consideration of the jury. Under this rule, the admission in evidence before the jury of the order changing the venue in the case because of prejudice against the accused, was erroneous. See the opinion in extenso on the question.
2. **SAME.**—The admission in evidence of the order changing the venue was otherwise material error, under the rules that "evidence, to be admissible, must relate to relevant facts in issue," and that "a defendant is entitled to a verdict on competent evidence, and the admission, over his objection, of incompetent evidence which might influence a jury to his prejudice, requires a conviction to be set aside, even though there be sufficient legal evidence to sustain it." Note also the suggestion of this court, that the error of admitting the order changing the venue, intensified as it was by comment of prosecuting counsel, could not be cured by an instruction to the jury to ignore the change of the venue.
3. **MURDER—CHARGE OF THE COURT—BURDEN OF PROOF.**—The defense interposed to this prosecution was that the deceased fired the fatal shot and killed herself. Upon that issue the trial court charged as follows: "If, from the evidence, you believe that Anna Smith took her own life, and that the fatal shot which deprived her of life was not fired by the defendant, but by her own hand, or by any other means than the act of the defendant, then he is not guilty, and you should so find." *Held:* That the charge was erroneous because it imposed upon the accused the burden of proving his innocence. The instruction should have been to the effect that if, from all the evidence, the jury entertained a reasonable doubt whether the defendant killed the deceased, or whether the deceased killed herself, they should acquit him.

APPEAL from the District Court of Kaufman. Tried below before the Hon. S. R. Frost, on exchange.

The indictment in this case was presented in the district court of Hunt county, Texas, on the fourteenth day of July, 1885. It charged the appellant with the murder of Anna Smith, in said Hunt county, on the second day of July, 1885. At its February term, 1886, the district court of Hunt county, upon the application of the appellant, entered its order changing the venue to the county of Kaufman. This trial, which was had in the district court of Kaufman county, in July, 1887, resulted in the conviction of the appellant for murder in the second degree, and

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his penalty was assessed at a term of ten years in the penitentiary.

The proceedings had upon the appellant's habeas corpus trial for bail have been condensed in the nineteenth volume of these Reports, beginning on page 572. Several of the witnesses who gave evidence on the said habeas corpus proceedings testified upon trial, but much more in detail. The evidence of said witnesses will be merely summarized in this report.

Mansel Mathews was the first witness introduced by the State. He testified that, in July, 1885, he lived in the town of Greenville, Hunt county, and at that time knew both the deceased and the defendant. The deceased came to her death on the morning of July 2, 1885, at a point in Hunt county, about one mile north of Payne's store, and about six miles north of Roberts Station. A few days prior to July 1, 1885, Miss Lou Vansickle informed the witness that there was to be a ball at Roberts Station on the night of July 1. On that day the defendant asked the witness if he intended to attend the ball. During that day, Miss Lou Vansickle and Miss Anna Smith came to town, and witness and defendant arranged to escort them to the ball, the witness to take Miss Vansickle, and the defendant to take Miss Smith. On that afternoon the witness and the defendant, each taking a buggy and team from the witness's livery stable, drove out to the house of Miles Vansickle, got the girls, and drove with them to the ball at Roberts Station, Miss Vansickle going in the buggy with witness, and Miss Smith going in the buggy with the defendant. They left the ball at about two o'clock a. m., on July 2, defendant and Miss Smith going in advance. When witness and Miss Vansickle, on their way home, reached a point about a mile north of Payne's store, they found Miss Smith sitting under a tree by the roadside. It was then but a few minutes before daylight, and it was the first the witness had seen of Miss Smith since she left the ball at the station. Defendant at that time was standing on the ground in front of his horses, about one hundred yards further up the road. Miss Vansickle asked Miss Smith to get in the buggy and ride with her and the witness, which Miss Smith refused to do. Miss Smith explained that she and the defendant had quarreled, and that she had left his buggy and refused to ride with him. Miss Vansickle persisted in her effort to get Miss Smith to share witness's buggy with her. Miss Smith, however, as persistently refused, remarking that she had disgraced herself, and would not disgrace Miss Vansickle, and that

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she expected to stay where she was until she died. Witness and Miss Vansickle then drove on to where the defendant was standing at the head of the horses. He said that he and Miss Smith had quarreled, and that Miss Smith left the buggy, declaring that she would not ride with him. He appeared to be considerably annoyed by Miss Smith's refusal to continue the ride with him. Witness told him to go back and get Miss Smith. He replied that he would go back and try to get her, if witness would hold his horses. Witness got out of his buggy, and defendant went back towards Miss Smith. Witness then unhitched the traces of the defendant's horses, and tied the lines to the dash board. He then waited until he heard the defendant and Miss Smith coming, when he and Miss Vansickle drove on toward Greenville. Witness and Miss Vansickle had driven not above two miles, when they heard the rapid approach from behind of a buggy and team. They soon discovered it to be the unoccupied buggy and team of the defendant, the lines still attached to the dash board, as witness had left them. Witness got out of his buggy, caught and hitched the team, and he and Miss Vansickle then drove back over the road they had just traveled, until they reached Powell's house, where they found the defendant. Defendant, who had his pistol in his hand, got into their buggy, and witness and Miss Vansickle drove back with him to where they first left his buggy standing, that point being about one hundred yards from the tree under which the witness last saw Miss Smith sitting. At that point they found the dead body of Miss Anna Smith, lying by the road side.

Upon reaching the place where the body lay, the defendant got out of the buggy, lay down along side the body, and put his left arm under the head, while he held his right hand, still grasping the pistol, behind his back. Witness requested Miss Vansickle to get out of the buggy and get defendant's pistol; which she did, and then got back into the buggy. Defendant had previously refused to surrender the pistol to the witness. Witness and Miss Vansickle then drove off towards the branch, and Miss Vansickle fired off the two loads then remaining in the pistol. They then turned and drove around the defendant and the deceased, and left. Defendant, when found by witness and Miss Vansickle at Powell's, just before the discovery of the dead body, appeared very reckless, and much distressed, and held his pistol in his hand all the time until it was taken, at the body, by Miss Vansickle. Witness did not see defendant after leaving

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Roberts Station, until he found him standing at the head of his horses in the road, near where Miss Smith afterwards met her death, which was about six miles distant from Roberts Station. It was between four and five o'clock in the morning when he overtook defendant. He was overtaken by the empty buggy and team about thirty minutes after he left the said buggy in the road.

Cross examined, the witness said that Miles Vansickle, the father of Miss Lou, lived about ten miles from Greenville, and about eight miles from Roberts Station. The several parties, bound for Roberts Station, left Miles Vansickle's house about sun down, deceased and defendant traveling in advance. At a point about two miles from Vansickle's, witness and Miss Lou found defendant and deceased waiting for them. Witness then produced a bottle of whisky and a package of candy. Witness, defendant and Miss Smith each took a drink of whisky, and Miss Vansickle took some of the candy. The party then proceeded in the same order. Just before reaching Roberts Station witness and Miss Vansickle again overtook defendant and Miss Smith, and the two latter and witness took another drink of whisky. The parties then entered the hotel at the station, and joined the dancers. Witness danced the first set with Miss Vansickle, and the second with Miss Smith. Defendant danced the first set with Miss Smith and the second with Miss Vansickle. After the second dance, witness and Miss Vansickle, and defendant and Miss Smith, left the ball room and took a stroll. There were then no residences about Roberts Station. If Miss Smith drank any whisky after she got to the station the witness did not remember it, but she drank every time, en route there, that witness and defendant did.

On the return home, the witness, just after leaving the station, left the main road and took an inferior road which rejoined the main road about a mile further on. A heavy rain had recently fallen and the roads were somewhat heavy. Witness drove as rapidly as he could through the darkness and over the heavy roads, but did not get in sight of defendant and Miss Smith until he found Miss Smith, as stated, beyond Payne's, sitting under the tree, and the defendant in the road, a hundred yards further on.

From this point the witness repeated in detail his narrative on his direct examination, and stated that, when he found the defendant at Powell's, after Miss Smith's death, but before he

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(witness) had seen the body, the defendant was hallooing, crying, moaning and "taking on terribly." He then stepped up to witness's buggy, with his pistol in his hand, and said that Anna Smith had killed herself; that, just as he was hitching the last trace, Anna jerked his pistol out of his hip pocket and, before he could interfere, shot herself; that then, as soon as he could, he took the pistol and shot himself, intending to kill himself, but lost his nerve and failed. He then climbed into the witness's buggy and told witness that Anna's body was at the point on the road where witness left the buggy, and directed the witness to drive rapidly to that place; which the witness did. On reaching the body, the defendant sprang from the buggy, and threw himself down by the body, in the manner described by the witness on his direct examination. He wept violently and boisterously, and said that if he had the nerve he would kill himself. He appeared to be so frantic and distraught that witness became somewhat apprehensive that he would do violence to himself. Miss Vansickle then secured his pistol, and she and witness drove back towards the branch near where they had last seen Miss Smith alive, when Miss Vansickle emptied the pistol by discharging it. Anna Smith was shot over the left breast, and was powder burned. Defendant was shot in the left shoulder, and was powder burned.

On re-direct examination, the witness said that Miss Vansickle did not drink any whisky at any time on the tragic night, but drank some blackberry brandy. The roads were too muddy to admit of very rapid driving. Witness had been to Roberts Station but once since the tragedy. Shortly after he and Miss Vansickle left the defendant and the body of the deceased, they met Mr. J. R. Powell and another man going to the body. They were then about three hundred yards from the body. The witness had often seen the defendant before the night in question, but had never attended a social gathering with him before. Witness did not attempt to disarm the defendant after the tragedy, because he was himself unarmed, and feared that defendant, in his then mental condition, would resist to the extent of doing violence. Previous to this night, the witness had heard the defendant speak of receiving letters from Anna Smith, but did not remember that defendant ever said that he was going to marry her. When defendant got in witness's buggy at Powell's he said to witness: "Drive them horses, and drive them d—d quick."

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T. J. Humphreys testified, for the State, that in 1885 he was the justice of the peace of the Roberts Station precinct in Hunt county, Texas. As such officer he held the inquest over the dead body of Anna Smith, which he found in the public road, about six miles from Roberts Station, and about a half a mile north of Payne's store. Several persons, including the defendant, were present when witness reached the body. Miss Vansickle produced a forty-eight calibre pistol, between fourteen and sixteen inches long, which she said belonged to the defendant. Witness saw a rope in the possession of Mr. Powell which had some knots and loops in it. The two loops were about three inches in diameter and about six inches apart. The rope was of sea grass, such as is used for horse hobbles. A large tree stood about one hundred yards from where the body lay. There were tracks about the body of the tree, and at its foot an imprint left by some person who had sat there. Witness observed nothing wrong about the clothing of the deceased, except a bullet hole over the left breast, at which point the dress was powder-burned. The dress on the body was of white material, and the basque of black velvet. Witness did not see a pool of blood about the body. He impaneled a jury of inquest, and had the body placed in a wagon and taken to Payne's store. Witness saw no woman tracks about the tree referred to. The ball entered the body just above the left nipple, and passed straight through the body. Witness also observed a bruise on the girl's shin, and some bruises on her thigh. Deceased was a small woman, under the medium size.

On his cross examination, the witness stated that the bruises on the shin and thigh of the deceased were purple in color. He could not tell how old they were. The bruises on the thigh were not so purple or blue as the one on the shin. Witness reached the body about eight o'clock, and had it removed to Payne's store about ten o'clock. On his re-examination the witness said that, about thirty minutes after he reached the body, he placed the defendant under arrest. He, defendant, was wounded through the muscles of the left shoulder. When he arrested defendant the witness threw his arms around defendant from behind, and told him to consider himself a prisoner, and to surrender his pistol if he had one. Defendant replied: "If I had a pistol, I would settle it with you and myself." Defendant had been kneeling by the body, "taking on" a good deal, and exclaiming that he would give worlds to be able to recall six hours.

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On re-cross examination the witness said that, in "taking on," the defendant "took on" like one bewailing the loss of a friend. He cried and moaned and "took on" like one crazy or heart-broken. He apostrophized the girl as his lost love, and declared his wish that he had had the nerve to have died with her. He made no effort to escape.

J. R. Powell testified, for the State, that he lived about a mile from the point on the road where, in the early morning of July 2, 1885, the dead body of Miss Anna Smith was found. At barely daylight on that morning the witness heard four reports of a pistol. The second shot was fired a few seconds after the first, and the third and fourth shots were then fired in rapid succession. But a short time before he heard the shots, the witness saw a gentleman and lady in a buggy traveling north. Within a few minutes after the shots were fired, the defendant and a man named Williams, a stranger to the witness, came to the witness's house. Defendant, who then had his pistol in his hand, told the witness that "one of his loves" had shot and killed herself, and that her body was lying in the road. He then said that he wanted a horse to follow his team, which had broken away from him. Witness told him that he had but one horse, which he was going to use, and could not let him have it. Defendant then threw up his hand and asked: "What would you do if I should say that I am going to have one?" Witness then told defendant to wait until he got his shoes on, when he would get a horse and go with him. Defendant was then crying, moaning and "going on" like a person in great distress. About the time that witness got his shoes on, Mansel Mathews and Miss Lou Vansickle arrived in a buggy. Defendant said: "Thank God, there comes Mathews!" He then went to and got in the buggy with Mathews and Miss Vansickle, told them about the girl killing herself and directed Mathews to drive rapidly to the body. They left, and witness presently followed. En route to the body he heard two more pistol shots, and soon saw Mathews and Miss Vansickle returning in the buggy. Witness went on to the body, where he found the defendant and nobody else. He was lying by the body, weeping and "taking on" violently. He exclaimed that he would give the world to be able to call back only six hours; that he had promised the girl to die with her, but that his nerve failed him. After lying by the body for about thirty minutes, defendant got up and witness observed a note on the ground, which he picked up. Defendant snatched it from wit-

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ness's hand, tore it in two, read the part that remained in his hand and then threw it down, and witness again picked it up. Defendant went to the branch several times to get water. He asked witness to raise the girl's head, which the witness did, and he then placed his coat under it. He then said that the body ought to be shaded, and proposed to pay witness to attend to it. Witness then cut some brush which he arranged over the body.

Very near the road, and about one hundred yards south of where the body lay, was a tree in the sand, at the roots of which the witness observed the impression left by some person who had sat there. There were the tracks of both a man and woman about the roots of that tree, and also an impression made by the heel, toe or side of a foot. The tracks of a man and woman led from that tree up the road to a point about opposite the point where Charley Simmons claimed to have seen a pool of blood. Witness saw no woman's tracks beyond that point, although for a short distance, until it reached hard ground, the soil was soft enough to retain the impression of a foot. Witness could see tracks on the hard ground, but they were too indistinct to show whether they were made by the feet of a man or a woman. Near the place in the road where the hind wheels of a buggy had stood, the witness found a strand of a three-quarter inch sea grass rope, which said rope was slightly stained either with blood or paint. There were two loops in that rope, about a foot apart, one of the loops being partially drawn out. Witness could not remember exactly what the defendant said in connection with his statement about having tried to kill himself, but it was something to the effect that he might as well have done so, as he would "be hung any how." The witness saw about half a tea-cup of blood at the point where the body lay. Defendant told witness how the girl got his pistol, but witness could not now recall his statement in that connection.

On his cross examination, the witness said that he was sitting on the side of his bed, dressing, having just gotten up, when the defendant and Williams came to his house. He had not seen the man Williams since the defendant's habeas corpus trial in November, 1885. The first four shots mentioned by the witness were all fired within ten seconds. Defendant was weeping and moaning during the whole time that he was at witness's house on that morning, but when he saw Matthews and Miss Vansickle coming to the house his face brightened perceptibly, and he said earn-

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estly: "Thank God, there they come!" It was a mile from witness's house to the point where the body was found, and a mile thence to Payne's store. The soil in that part of the country was very sandy, and the ground was heavily timbered. The witness saw no pool of blood, nor any blood except the small quantity he saw at the place where the body lay. Several days after the tragedy, and after a rain had fallen, Charley Simmons showed the witness a small spot near an elm tree, about ten steps from where the body was found; but that spot was clean, and looked to the witness like discoloration produced by the urine of a horse. Mr. Merchant's horse was hitched to that elm tree on the day the body was found and examined. Witness looked all around that place on the day of the tragedy, but discovered no blood; and he was satisfied, if there had been any blood there on that day, he would have discovered it. The place under the large tree, where the witness saw the impression of a sitting person, was a sand drift, and it extended up to the tree. The impression on it appeared to have been made by the body of a person in either a sitting or lying posture. The foot impressions were about three feet from the roots of the tree. The ravel of grass rope was found in the middle of the road. It may have been either rust, blood or paint on the rope. There was a place on the road, about six hundred yards from the place of the tragedy, where a man had camped. Witness followed the tracks of a man from that camp to the place of the tragedy, and then to his house, and presumed that those tracks were made by the man Williams.

Doctor T. E. Yoakum was the next witness for the State. He testified that he was present at the inquest upon the body of the deceased, which was held at Payne's store, in Hunt county, Texas, on July 2, 1885. He made a close and critical examination of the body, and discovered that the cause of the girl's death was a gun shot which entered her left breast between the third and fourth ribs, and passed straight through the body. He saw three purple bruises on the inside of the right thigh, which were of the shape and size of finger nail prints. There was also a small bruise on the inside of the forefinger on the right hand, between the first and second joints. Witness saw no other bruises on the body. He made a vaginal examination with an instrument. He found the vagina enlarged and relaxed, and filled with a secretion which he took to be male semen. He, however, was not positive as to the character of the secretion, but was satisfied that whatever it was, it was deposited but a

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short time before death. There was no bruise on the left leg. The girl would weigh about one hundred and twenty-five pounds, and was about medium size. As a general rule, the arms of a woman are shorter than those of a man. Witness saw a long pistol at the inquest. On his cross examination, this witness stated that if the girl's heart was in a normal position, the bullet would have passed through the upper part of it. The effect of lacing is to force the heart upward a little. If the girl's heart was so elevated by tight lacing where she was shot, the ball pierced the organs of the heart. Paralysis of the heart, in that event, ensued instantly, and prevented the flow of more than a very little blood. On his re-examination, the witness stated that if the ball struck the artery above the heart, the girl could not have taken more than one or two steps after receiving the shot. If her heart was in its normal position the ball would have pierced an artery and produced a considerable flow of blood. The position of the body after it has fallen has much to do with the quantity of blood that escapes through a wound. The body of an average sized woman contains from fifteen to eighteen pounds of blood. If the ball had cut the artery above the heart, at least twenty-five per cent of the blood in the body should have escaped. If the ball punctured the muscles of the heart, death resulted almost instantly, with little loss of blood. It would have required a post mortem examination to determine accurately the quantity of blood discharged through the wound.

Charley Simmons testified, for the State, that he was at the place of the tragedy on the day after the body of the deceased was found. At a point ten or fifteen feet from the road, and about twenty steps from the tree under which the girl was said to have sat, and about seventy-five or eighty yards from where a buggy had stood in the road, the witness saw a pool of blood which must have originally contained as much as a gallon. It covered a space as large as a hat. Witness showed that place to J. R. Powell four or five days later. On his cross examination, the witness said that the weeds about the pool of blood that he saw had been mashed down. The pool was an inch deep, and was a foot across. The said pool was near an elm tree, and had a thin scum of blood over it when witness saw it. Mr. Powell was the first man witness told about the pool of blood, or showed it to except his father, brother and a Mr. Baird, whom he told of his discovery. Witness's little brother was with him when he found the pool of blood. Witness lived with

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his father about two hundred yards from Payne's store. He was at Payne's store during the inquest, knew what was going on, and saw the defendant there.

John Hunter testified, for the State, that he was the mail carrier between Greenville and Payne's store, in Hunt county, in July, 1885. He slept at nights at the house of Mr. J. R. Powell. While he was feeding his horses at Powell's barn, on the morning of July 2, 1885, he heard four pistol shots. Soon afterwards he saw an empty buggy and a team pass the house. The horses were then loping. The defendant soon came to Powell's house and said that one of his loves had shot and killed herself. Witness afterwards went with Powell to the body, and afterwards went to Greenville. A mile or two from Powell's he passed the runaway buggy. It was then standing in the road, with two horses hitched behind it. A silk handkerchief lay on the buggy seat. The witness also saw some blood on the buggy seat.

On his cross examination, the witness stated that he lived at Payne's store at the date of the tragedy, and still lived there. He had never testified in this case before, and had never told any one about what he knew or saw, since he was subpoenaed, now a year ago. He could not now say what, or to whom, he told about it before he was subpoenaed. Witness was about one hundred yards from Powell's house when he heard the four shots fired. They were fired very near together, with a shorter interval between the third and fourth than between the first and second shots. The buggy and horses passed Powell's house within five minutes after the shots were fired. The buggy, when witness afterwards saw it, was standing three or four feet from the road. Witness rode by the buggy without stopping. He did not examine the cushion closely, but saw something on it which looked to him very like blood. This belief was strengthened by the fact that he had seen the dead woman up the road. The blood was spattered on the east end of the cushion. Witness could not say positively that it was blood he saw on the cushion. Witness had carried the mail for ten months at the time of the tragedy, but did not know the name of the post master in Greenville. He had no other acquaintance in Greenville than Charley Hill, at whose place he kept his horse when in Greenville. Witness was at Payne's store during the inquest over the body, on the evening of July 2, 1885. He saw a great many people at the inquest, but told nobody what he had seen on that morning.

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J. A. May testified, for the State, that he lived in Greenville, Texas, in July, 1885. About six weeks before the tragedy the defendant borrowed of the witness a forty-four calibre Smith & Wesson pistol, leaving his small, five shooting pistol in the place of it. He didn't tell witness what he wanted with the pistol, nor say anything more to him at the time than that he was going to Caddo Mills. The witness's pistol (the one in evidence) was returned to the witness after the death of Anna Smith by the district attorney. That pistol was not a self-cocking pistol, and was hard to cock and very heavy on the trigger.

Eli Maloney testified, for the State, that he lived near Payne's store, and served as one of the jury of inquest which sat upon the body of Anna Smith. Witness, taking several ladies with him in a wagon, reached the scene of the tragedy between eight and nine o'clock. He went first to the tree under which it was said the deceased was sitting when last seen alive by Mathews and Miss Vansickle. On the west side of that tree, and extending from it, the witness saw the imprint of cloth or clothing, the track of a man and a woman, and some scratches in the sand. He then went to the body, which he examined critically. He saw a bullet hole through the left breast, and a small bruise on the inside of each thigh a little above the knee, and a third one higher up on one of the legs. The bruises extended two and a half or three inches up and down the leg, and were deeper in some places than in others. He also saw a bruise as large as a silver dollar on one of her shins. Witness could not tell whether those bruises were old or fresh. At the inquest, the witness and Doctor Howell took the clothing off the body, and witness examined the said clothing carefully, but observed nothing unusual about any of it. Witness saw a strand of rope, with a loop in one end, lying in the road ten or twelve feet from the body. There was a slip knot in the rope about eight inches from the loop. The loop was large enough to admit the passage of a man's fist. Witness observed no bruises about the neck or arms of the deceased. On his cross examination the witness said that a number of men and women were at the body when he arrived. They were walking from the body to the branch on both sides of the road, hunting for evidence. No blood was discovered by the searchers that the witness heard of. Witness saw no blood on the girl's outer clothing, and but little on the under clothing, and the most of that was at the entrance of the wound. When the witness arrived upon the ground Mr. Powell was standing at

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the tree, and appeared to be guarding its approaches to prevent examiners from obliterating the impression at the roots.

C. J. Stegar testified, for the State, that he was a member of the jury of inquest over Anna Smith's body, and made a careful examination of the body and ground. The tree referred to by the previous witnesses as the one under which the girl was seen sitting by Mathews and Miss Vansickle was really two trees standing close together, connected by a root. On the sand banked up at the foot of these trees, the witness saw the impression of clothing which indicated that some person had either been sitting or lying there. Further out from the tree the witness saw the impression of the heels and toes of a shoe or boot. The toe impressions were nearer together than the heel impressions, and extended further out from the tree. There was a bruise on each of the thighs, which looked fresh to the witness, and which from the size and shape he thought were made by finger nails. Witness saw no bruise on either the neck or arms. He saw a small bruise on the right fore finger. Mr. Powell had a rope in his hand at the inquest, which had two loops in it, and a stain of some kind on it. On his cross examination this witness stated that he examined the ground on both sides of the road from the point where the body lay to the branch, but made no other discoveries than those he had mentioned. He could not trail the woman's track from the trees. Witness could readily tell the difference between the impression made on sand by a woman's dress and that made by anything else. His knowledge in this respect was based upon experiment. The impression in this case showed from the legs to the back, toward the tree. Witness could tell the difference between the impression of a toe and heel. If a person lies down and braces with the heel, the heel will sink into, and the toe will scrape, the ground. The impressions observed by witness were not over three and a half hours old. There was a considerable difference between a track and impression two and a half and one six hours old. The tracks described by the witness were nearly in the edge of the road. Witness had often bruised his own person, and knew that such bruises, when fresh, were of a blue color, and turned black when grown older. He did not know how such bruises would be affected by death.

W. W. Adams, another member of the coroner's jury, testified, for the State, that when he reached the body there was no one there but the Powells and the defendant. The body lay in

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the road, about one hundred yards south of a certain tree which stood on the road side near a branch. An impression at the foot of that tree showed that some person had recently sat there. The tracks of two different persons, being of different sizes, showed around the tree. The witness saw two bruises on the girl's legs, which appeared to have been made by pinching. There was another small bruise on the right forefinger. When the witness arrived upon the scene the defendant was talking, weeping, moaning and "taking on" greatly. He told witness that Anna Smith had shot and killed herself; that, while he was hitching his horses to his buggy she snatched his pistol from his hip pocket and shot herself; that he then took the pistol from her and shot himself, intending to kill himself, but that his nerve failed him; that he would be accused of the murder of the girl, but was innocent, and would give five hundred dollars, one thousand dollars, or the world, if he could but recall his last six hours. He said also that the last words Anna Smith said to him were "Henry, don't do that," but did not tell witness what it was the girl told him not to do. On his cross examination the witness said that he examined both sides of the road from the body to the branch, but discovered no impressions other than those at the foot of the tree. There was but little blood on the underclothing. The girl, when killed, had on a black velvet sacque, a corset under the sacque, and a chemise under the corset. Her skirt was of white material. There was no blood on the skirt. The bruised places mentioned by the witness were discolorations of the skin, about the size of a finger nail. Both the clothing and the flesh of the deceased at the entrance of the wound were powder burned. The powder burn on the skin extended from the wound to the shoulder. The black velvet sacque showed the scorch or powder burn but little, but the underclothing showed it considerably. When the witness reached the body the defendant was lying down by the side of it, with his arm under the head, and was weeping and wailing like one who had lost a near relative. He appeared to be in sore grief. Defendant remained on the ground until he was arrested. Witness saw the pistol with which it was said Anna Smith was killed. It was a very large weapon.

W. B. Horton testified, for the State, that he was the constable of Greenville precinct in Hunt county, and as such officer, he attended the coroner's inquest upon the dead body of Anna Smith. While that inquest was in progress, the witness observed a bruise on the back of the deceased's neck, and also the bruises

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described by the previous witnesses. The bruise on the neck was about three inches long, and was about as wide as a man's finger. On his cross examination, the witness said that he left Greenville about eight o'clock in the morning, and reached Payne's store, sixteen miles distant, at about eleven o'clock. He saw the defendant's buggy at the store, and examined it, but found no blood on it, nor on the cushions. Deputy Sheriff Chaffin took defendant to Greenville in that buggy. Witness saw Will Shamburger's wife at the inquest.

Deputy Sheriff A. B. Chaffin testified, for the State, that he brought the defendant to Greenville in the buggy that defendant was said to have used during the night before. If there was any blood on that buggy or on the cushions, witness did not see it. Witness saw the body at the inquest and observed the bruises described by the witness Horton.

Miss Ada Minchen testified, for the State, that at one time she was engaged to marry the defendant, but was not engaged to him at the time of the tragedy. She formed the acquaintance of the defendant in 1876, and for three years thereafter he visited her regularly, and since that time he had waited upon her periodically. Witness had often gone out under the escort of the defendant. His conduct towards her, and towards all other ladies, so far as she was advised, had always been exemplary.

George Jones testified, for the State, that he did not attend the inquest over the body of Anna Smith. He went to the place of the tragedy after the arrest of defendant, and took charge of the defendant under the order of the magistrate. Witness took the defendant to the tree described by previous witnesses and there saw the imprint of the clothing so often described. He also observed what he took to be the imprint of stockinged legs. About five feet from the root of the tree he saw what he took to be the impressions of toes or heels. On his cross examination, the witness said that he reached the ground about ten o'clock. He could not say what kind of cloth or clothing made the impression he described. What he took to be the imprints of stockinged legs were about two and a half feet apart, and ran with the course of the cloth print. They were about a foot and a half long. They did not turn out or widen at the lower end. Witness could not tell whether the other impressions he saw were of heels or toes, nor where the rest of the feet came to. The heel or toe prints were near the end of the impression made by the stockinged legs.

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J. P. Powell testified that he heard four shots which were fired in rapid succession, at about daylight. He did not think a person could count more than two between the first and second shots. When he reached the body, word having been sent him by the mail carrier, he found his brother, J. R. Powell, the man Williams and one or two other persons on the ground. Defendant was then lying down by the body, in evident great distress.

A. E. Waldron testified, for the State, that he attended the ball at Roberts Station, on the night of July 1, 1885, and saw the defendant and the deceased there. Defendant appeared to be ill at ease, as though he had something on his mind. The deceased appeared cheerful and happy.

On his cross examination, the witness said that he saw at the ball, besides the defendant and Miss Smith, Governor O. M. Roberts, Perry McBride, Doctor Mings, Miss Mathews, Miss Vansickle and others. When witness first observed the defendant on that night, he was talking to Mr. Mathews. He had previously seen the defendant, but had no acquaintance with him. He did not see the defendant and deceased promenading together on that night. Witness now lived in Detroit, Michigan, but at the time of the tragedy lived at Roberts Station, in Hunt county, Texas.

A. Cameron testified, for the State, that, on the evening before the death of Anna Smith, he stepped from the street into the Hunt county bank, of which, until recently before that evening, he had been cashier, and saw the defendant in front of the cashier's desk. The defendant was then in the act of placing a considerable roll of money in his pocket. The roll was of the size of a man's wrist. Defendant then lived south of Greenville, and owned a farm and gin. He did considerable business with the bank during the time that witness was cashier, and witness often paid him large sums of money. He often bought and paid for machinery. No ginning was being done in Hunt county in July, 1885.

At this point the State introduced in evidence the order of the district court of Hunt county, changing the venue of this cause to Kaufman county, which said order recites that, because of prejudice against the defendant in Hunt county and combination of influential citizens against him; he could not get a fair trial.

The State then closed.

Mrs. Isaac Smith, the mother of the deceased, was the first witness introduced by the defense. She testified, in substance,

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that the deceased left home on the Saturday preceding her death. Witness saw her again on the following Wednesday, when she came to the house in a buggy with Miss Lou Vansickle, going to Greenville. She said that she would come back and get her clothing, which she did. The deceased and her father had quarreled before that time. Deceased disobeyed some direction given her, and her father threatened to whip her, and finally did whip her. She had just returned home drunk from Caddo Mills, and her father was also under the influence of whisky. Witness and her family moved to Hunt county in the fall of 1884. She had never known the deceased to drink before coming to Hunt county. The whipping of the deceased by her father occurred a short time before the death of the former. During the quarrel which preceded the whipping, the witness sent for Mr. Johnson to come to the house and stop the row. On one occasion, at night, the witness missed the deceased from her room, and when she returned to the house witness took her to task about it. Prior to her death, the deceased kept company with Mr. Grimes, Mr. Daggett, Mr. Johnson, Allen Smith, Mark Hale and the Lee boys. She often attended parties and other social gatherings. A letter (which will appear in a subsequent portion of this statement) was written by the deceased on the fly leaf of a book, on the Monday morning before the tragedy, just before she left home.

Cross examined, the witness stated that the deceased formed the acquaintance of the defendant in the spring of 1885, when she lived at Mrs. Johnson's. The objections urged by witness and her husband to her association with the defendant caused the trouble between deceased and her home people. On one evening the defendant called to take the deceased to a school exhibition at Caddo. Upon his promise to bring her back before sundown, her father consented, and deceased and defendant went off. The deceased did not come home until the next evening, when she was very drunk. She and her father had a row. Witness objected to deceased's association with defendant because he gave her whisky. Deceased had always before taken a drink whenever she wanted it, but witness had never known or heard of her being drunk until she went to Caddo with defendant. Deceased was about seventeen years old, was obstinate and hard headed and not easily controlled. When she wrote the letter referred to by witness, she said that she was going to leave home.

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At this point the defense introduced in evidence the letter referred to by the witness. It reads as follows:

"Good-bye to the family. Forget, but I will not ask you to forgive. I have disgraced you, but I will never more impose myself upon you. Jim, I am no one to give advice, but do as you are doing now, and let no one have influence over you. Belle, do just the opposite of what your disgraceful sister has done, and the world will honor you. Beula, mind Ma, and be a good girl. Ma, I am sorry it is so I have to leave you, but it is too late to repent now. Pa, never spoil another one of your children by giving them too much rope. For your soul's sake, and for the sake of a family who look to you for support, quit the damnable cup. It has ruined you and me. And now forget that I ever existed. To those who once were friends of mine, I ask them to think of me only when I was good. Now farewell, for time eternal!"

ANNA."

Bose McFarland testified, for the defense, that he lived in Fannin county, and knew the Smith family when they lived in that county. He knew the deceased from the time she was large enough to go to school until she removed with her father's family to Hunt county. Deceased was a lively girl, and very full of fun, but never drank intoxicants, so far as the witness knew. Witness saw her at a protracted meeting in Fannin county one night not long before her family moved off, and talked with her for a few minutes. She was exceedingly lively and talkative on that occasion, but if she had taken a drink, witness did not detect it. She walked home with Charley Briggs on that night, and en route hallooed to several of the boys passing along the road. Deceased's father was then a very poor man.

Jeff Johnson testified, that he knew the deceased for nine years before her death, but saw little of her from her childhood until she moved to Hunt county in the fall of 1884. Witness's brother married a cousin of the deceased. Deceased's father lived about three hundred yards from witness's house in Hunt county. About June 1, 1885, deceased's sister came to witness and his brother, and asked them to go to the house of the deceased's father and stop a quarrel that was then in progress between deceased and her father. When witness reached Smith's house he found deceased on the bed, and her father on her, holding her hands—they were both drunk and cursing each other. It seemed

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that deceased had left home without consent and that old man Smith had attempted to whip her. He told her that she had either to leave his house or obey him, and that unless she would do his bidding she could not stay under his roof, and must hunt another home. She replied that she would do so or play "Jim Fisk." Witness and others dragged old man Smith off the girl and into the yard. They made repeated efforts to get at one another and cursed each other violently. Deceased said that the old man got the advantage of her by taking her weapons. Witness saw deceased drink whisky several times, but never saw her under the influence of whisky but the one time mentioned. Her reputation for chastity was bad, and to witness's knowledge had been bad since Christmas, 1884. Witness heard, as early as the said Christmas, that she was criminally intimate with men, and since that time had heard that she had maintained illicit relations with the defendant.

J. W. Hulsey, justice of the peace of the Caddo Mills precinct of Hunt county, testified, for the defense, that the father of the deceased and he were cousins. Witness lived within half mile of Smith in 1885. He knew that, at the time of Anna Smith's death, or for some three or four months prior thereto, Anna's reputation for chastity was bad. Witness never heard of her maintaining illicit relations with men until she got to going with defendant. She was soon after said to serve other men. Witness had heard that she was kept by defendant, and had also heard that she was kept by Ike Lee.

Thomas Murphy testified, for the defense, that prior to the tragedy he lived within a mile and half of the deceased. The reputation of the deceased for chastity was bad for several months before her death. It was generally reported throughout the neighborhood that she maintained carnal relations with Ike Lee and Mack Hale. Witness saw her at a pic nic with Mack Hale in the spring of 1885. They arrived at about twelve o'clock, got some lemonade, and immediately left in a buggy. Anna's clothing was then rumpled, and had fresh dirt on it. Defendant's reputation had always been that of an honest, peaceable, law-abiding citizen. On cross examination the witness said that he first saw the defendant and Anna Smith together at a party at Browning's, in Greenville. Defendant and the girl were then reputed to be too intimate. Defendant was regarded in Greenville as a man responsible on his word. He was good for his debts, and good on notes in bank. Witness never heard of de-

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fendant bothering virtuous women. With respect to lewd women he stood on a par with other young men. Other men were reported to have maintained illicit relations with Anna Smith before defendant's name was coupled with hers.

W. S. Grimes testified, for the defense, that he first met the defendant at Jim Johnson's house—whose wife was a cousin to the deceased—in October, 1884. The deceased was a fast, lively girl. Witness had often seen her drunk, and had seen her under the influence of whisky, but personally knew nothing criminal about her. He met deceased and her father at Mr. Lee's house in the spring of 1885. The parties present, including deceased and her father, drank distilled alcohol. Deceased took two drinks. Her father took several drinks and made deceased sing for the crowd. Deceased's reputation for chastity was bad. On Christmas night, 1884, at a party at Jim Johnson's house, witness saw deceased and Ike Lee lounging together on a single bed. She spent one night in February, 1885, at Jim Johnson's house, in the absence of Johnson's wife. She and Johnson occupied the same room, in which, however, there were two beds. Witness went to Smith's house on the night of the row between deceased and her father, testified to by Johnson. Deceased was in her night clothes on the bed. She and her father, who was dressed, had hold of each other, and were cursing each other. Her father was pulled off the deceased and dragged into the yard. Deceased's evil reputation for chastity dated back to Christmas, 1884. Her name, in that connection, was coupled with those of Ike Lee and Mack Hale, and with others, before it was coupled with the defendant's.

Cross examined, the witness stated that he would not undertake to say that deceased and Johnson slept in the same bed on the night in February, 1885, that deceased stayed at Johnson's house, but they did occupy the same room on that night. Defendant went with all the ladies in his neighborhood during the time that his name was coupled with that of deceased. His reputation was "that he liked women." Witness knew that defendant "kept" deceased when she was in Greenville. In this connection witness mentioned the names of a dozen or more good and virtuous young ladies upon whom defendant waited during the time that he was reputed to maintain criminal relations with the deceased. He associated with a great many poor and virtuous young ladies. On the night of the row between deceased and her father, the deceased told her father, when he said something

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about her leaving home, that she would leave and play "Jim Fisk at Long Branch." Witness had often heard her sing the Jim Fisk song to the young men.

Doctor Nays testified, for the defense, that he twice had the deceased under his professional care, once in the fall of 1884 and once in the spring of 1885. He smelled whisky on deceased's breath on his first visit in 1884. Her malady on the second occasion arose from excessive use of alcoholic liquors. At times, on both occasions, she was wild and frantic, would "cut up" generally and stand on her head. Then her system would relax and she would grow morose and apparently desperate, and would appear to suffer greatly from melancholia. The witness did not examine the body of the deceased, but he did not think that the bruises on her legs could have been made less than twelve hours before her death, judging from the color ascribed to them by other witnesses. This was not the witness's professional but his individual opinion. Witness could not say that whisky alone produced the deceased's condition when he first called to see her in 1884. She was suffering from the effects of intoxicants and other causes.

Robert R. Skinner testified, for the defense, that he attended the ball at Roberts Station on the night of July 1, 1885, and saw deceased, defendant, Mathews, Miss Vansickle, Governor O. M. Roberts, Perry McBride and others among the guests. Deceased appeared to be very despondent on that night. Witness danced one set with her and afterward took a promenade with her. During that promenade the deceased told witness that her father had beaten her and her family had driven her from home; that she had nothing to live for and had no desire to live longer. Witness remarked that her talk was nonsense. She replied that she would "as soon kill herself as not," and that she had tried once and failed. Defendant appeared to be in his usual spirits on that night.

Allen Smith testified, for the defense, in substance, that he knew Anna Smith well. She was very fast, permitted the boys to take any liberties with her, such as fondling her person, and had a bad reputation for virtue long before defendant became acquainted with her. Witness went with deceased a great deal, and had often heard her say that she had nothing to live for, and had as soon take her own life as not. Witness was very intimate with defendant. Defendant once told witness that he was

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keeping deceased, and that, as she was hard to get along with, or to get rid of, he expected to have trouble with her.

Mansel Mathews, recalled by the defense, testified that, almost daily, for a long time after the tragedy, he used the buggy used by defendant and Anna Smith on the fatal ride, and never saw any blood on the cushion or any other part of the said buggy. A short time before leaving Roberts Station, on the fatal night, witness and defendant discovered that some boys had taken their buggies off. Witness went into the ball room for the girls, and when he came back he found that defendant's buggy had been brought back, but that his had not. He found the defendant with an old rope in his hand, which the witness had thrown into the buggy to be used as a hitch rein. Defendant had tied one end of that rope around the axle of his buggy, and was tying the other end to the shaft of an old sulkey standing near. He laughingly remarked that he had no intention of leaving the witness and Miss Vansickle at the station, and that he was fixing a rig in which to take witness home. About that time witness's buggy was returned, and defendant threw the piece of rope into the box of his buggy. That was the piece of rope found on the scene of the tragedy.

Miss Lou Vansickle was next introduced by the defense. She testified substantially as she did on the habeas corpus trial of the defendant. Her testimony on that trial will be found in detail in the nineteenth volume of these reports, commencing on page 572. She stated, in addition, that, after her return to the place of the tragedy, and before the body was removed, she drove to Mrs. William Shamburger's house in the buggy used over night by defendant and deceased, and brought Mrs. Shamburger to Payne's store. She knew then that there was no blood on the buggy or the cushion. She also corroborated Mathews as to the incident of the rope, buggy and sulkey at Roberts Station, just before the party started home.

Mrs. Surella Shamburger's testimony, on the defendant's habeas corpus trial, will be found on page 577 of the nineteenth volume of these Reports. She testified on this trial substantially as she did on that, and, in addition, that she rode from home to Payne's store on the day of the tragedy, in a buggy said to have been the one used the night before by defendant and deceased. She saw no blood on that buggy.

Several witnesses testified that the reputation of the deceased for chastity was bad before she became acquainted with the

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defendant; and a dozen or more supported the reputation of the defendant as a peaceable, quiet and law abiding citizen.

The defense closed.

Miles Vansickle was the first witness called by the State in rebuttal. By referring to the testimony of Miss Vansickle, on the defendant's habeas corpus trial, it will be seen that she then testified that, on a trip taken by her, deceased and defendant, at night, some time prior to the tragedy, the deceased got out of the buggy a short distance from a branch or creek, and went alone to the creek; that, a few minutes later, a splash in the water was heard, when the defendant went to the branch, leaving her, Miss Vansickle, sitting in the buggy; that, after remaining in the creek bottom for some time, defendant and deceased returned to the buggy, and the deceased was wet from head to foot. Referring to this testimony of Miss Vansickle, her father testified that he saw deceased when she returned to his house on the night referred to by his daughter, but that he saw no wet garments on her. At the time referred to by witness and his daughter, there was not enough water in the creek to immerse a person. Several witnesses for the defense having testified that, although he sometimes took a drink, the defendant was a temperate man, this witness testified that he knew the defendant to be a drinking man, but knew many men who drank more than he did.

Ike Lee testified, for the State, in rebuttal, that he knew the deceased all of her life. He had never heard her reputation for chastity called in question until she began to associate with defendant. Defendant was reputed to be a man who drank sometimes.

James Johnson testified, for the State, in rebuttal, that he had never paid any particular attention to the deceased or to the rumors affecting her character. He heard, about Christmas, 1884, that she was too intimate with Ike Lee and Mack Hale. She formed defendant's acquaintance in February, 1885. Defendant was reputed to be a man who drank too much sometimes, and who was very fond of women.

Miss Belle Smith, sister of the deceased, testified that she saw the deceased write the letter in evidence. Deceased wrote it on Monday morning before leaving home, and told witness she was writing it because she was going to leave home.

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E. W. Terhune, R. L. Porter, E. B. Perkins and Clark & Morrow, filed an able brief and argument for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This prosecution was instituted in Hunt county, but on motion of the defendant the venue was changed to Kaufman county, and the conviction was had upon a trial in the latter county.

On the trial the State, over defendant's objections, read in evidence to the jury the order of the district court of Hunt county changing the same. This order recites that there exists such a prejudice against the defendant in Hunt county that he can not get a fair trial, and that there is a combination of influential persons against him in said Hunt county.

It was error to admit said order in evidence. It was wholly irrelevant to the issue on trial. It was merely a record of the court showing the jurisdiction of the district court of Kaufman county over the case. It was not a matter of evidence for the jury, but for the court alone. There was no issue as to the jurisdiction of the court over the case to be determined by the jury, save the simple one of the commission of the offense in Hunt county. It was the province and duty of the court, alone, to determine the question of the jurisdiction of the district court of Kaufman county to try and determine the case. An instruction to the jury that the venue of the cause had been changed from Hunt to Kaufman county, and that, if the proof showed the offense was committed in Hunt county, the venue was sufficiently proved, was all that was necessary, and all that was proper with reference to the matter of jurisdiction. A complaint upon which an information is based is not admissible evidence for the State. Even the information or indictment in a criminal case can not be used as evidence of the facts charged therein. They only serve the purpose of pleadings. So, an order changing the venue in a criminal cause only serves the purpose of transferring the cause to another jurisdiction, and furnishes to the court of such other jurisdiction evidence of its authority to try said cause. It is for no purpose competent evidence to go before the jury. (*Long v. The State*, 17 Texas Ct. App., 128.)

Evidence, to be admissible, must relate to facts in issue, and to relevant facts. In this case the fact in issue was the guilt of

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the defendant of the crime with which he was charged. The order changing the venue in the cause in no way related to that issue. It tended in no degree to prove or disprove said issue. But, notwithstanding its irrelevant character, its recitals were well calculated to prejudice the minds of the jury against the defendant. Hunt county was the home of the defendant, and the county in which the alleged offense was committed. The order showed that it was upon his motion that the cause had been transferred for trial from the county of his home; from the people among whom he resided, and who were acquainted with him, to another county, and upon the grounds that in his own county, and among those best acquainted with him and with the facts of the alleged crime, there existed against him such a prejudice as would prevent him from having a fair and impartial trial in said county, and that there existed against him in said county a combination of influential persons, etc. A recital of these facts to a jury would naturally and certainly prejudice their minds against the defendant. A defendant is entitled to a verdict on competent evidence, and the admission of incompetent evidence, such as might influence a jury, requires a conviction to be set aside, even though there be sufficient legal evidence to sustain it. (*Draper v. The State*, 22 Texas Ct. App., 404.)

Furthermore, the error of admitting the incompetent evidence referred to was intensified by the comments thereon of the State's counsel in his concluding argument to the jury. These errors were not and could not be cured by the instruction of the court to the jury not to consider the fact that the venue had been changed. (*Myers v. The State*, 6 Texas Ct. App., 19.)

With respect to other evidence admitted over defendant's objections, we do not think any material error was committed.

In one particular we think the charge of the court is erroneous. In charging upon the defendant's theory that the deceased killed herself, the language of the charge is as follows: "If from the evidence you believe that Anna Smith took her own life, that the fatal shot which deprived her of life was not fired by the defendant, but by her own hand, or by any other means than the act of the defendant, then he is not guilty and you should so find." This paragraph of the charge in effect devolves upon the defendant the burden of proving his innocence. It requires the jury to believe from the evidence that he was not guilty; that he did not kill the deceased; but that deceased killed herself. The instruction should have been that if, from all the evidence,

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the jury entertained a reasonable doubt whether defendant killed the deceased, or whether the deceased killed herself, they would acquit him. (*White v. The State*, 19 Texas Ct. App., 158; *Humphries v. The State*, 18 Texas Ct. App., 309; *Jones v. The State*, 13 Texas Ct. App., 14; *Dubose v. The State*, 10 Texas Ct. App., 253.)

Because of the errors we have discussed, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered December 14, 1887.

No. 2718.

T. A. MOODY v. THE STATE.

1. **SWINDLING—EVIDENCE—CHARGE OF THE COURT.**—See the statement of the case for evidence *held* to have been improperly admitted in a trial for swindling, inasmuch as it was both hearsay and immaterial to any issue in the case. But, had the same been admissible as bearing upon the question of intent, the charge of the court would be deficient in failing to limit it to that issue.
2. **SAME—INTENT.**—See the statement of the case for the evidence of the witness Hulen, *held*, though remote, to have been properly admitted as bearing upon the issue of intent.

APPEAL from the District Court of Grayson. Tried below before the Hon. D. H. Scott on exchange.

The conviction in this case was had under an indictment which charged the appellant with swindling, by converting to his own use certain funds belonging to the estate of the minors Thomas A. and Etna M. Touchton, of which estate he was the guardian. The penalty assessed was a term of two years in the penitentiary.

H. Hulen was the first witness for the State. He testified that he lived in Gainesville, Cooke county, Texas, and was the present guardian of the estate of the minors Thomas A. and Etna M. Touchton. He was appointed as such guardian by the county court of Grayson county in the fall of 1884. Prior to that time, and while the defendant was the guardian of the said estate, the

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witness had some business dealings with him. At this point the objection was interposed that the record was the proper evidence of the business transactions of the defendant as the guardian of such estate. The objection was sustained, and the witness was excused for the time being.

Robert Walker was next introduced as a witness for the State. He testified that he was the county clerk of Grayson county, Texas, and as such clerk was the custodian of all the books, records and papers pertaining to the estate of the minors Thomas A. and Etna M. Touchton. The documents now in evidence were the true, genuine and original documents, records, papers, etc., pertaining to said estate. The State then introduced in evidence the following instruments:

1. The original application of Thomas A. Moody to the county court of Grayson county for appointment as guardian to the estate of the minors Thomas A. and Etna M. Touchton, filed January 16, 1884, which said application reads as follows:

"To the Hon. S. D. Steedman, County Judge, Grayson County, Texas: Your petitioner, Thomas A. Moody, a resident of Grayson county, Texas, would respectfully show that Kirk B. Touchton died in Cooke county, Texas, November —, 1883, leaving surviving him a widow, Mary E., and two children, Thomas A. and Etna M. Touchton, said children aged respectively four and two years; that said Kirk B. Touchton died without leaving any will. Petitioner would further show that said minor children inherited from their said father, Kirk B. Touchton, property of about the value of five thousand dollars, consisting of money and monies due from life insurance companies and a small amount of other property. Petitioner would further show that said minors and their mother are actual residents of Grayson county, Texas. He would further show that said minors have no legal guardian, and that it is the desire of their mother that petitioner be appointed the guardian of the person and property of said minors. Petitioner therefore, prays that he be appointed guardian of the person and property of said minor children above mentioned.

"THOMAS A. MOODY,
"per A. B. PERSON, Attorney."

Indorsed:

"To the Hon. S. D. Steedman, County Judge, Grayson County, Texas: I hereby respectfully request that your honor appoint

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Thomas A. Moody guardian of the persons and property of my minor children, Thomas A. and Etna M. Touchton.

“Very respectfully,

“MARY E. TOUCHTON.”

2. The amended application of the said Thomas A. Moody to the county court of Grayson county for appointment as guardian, etc., filed February 11, 1884, which said amended application set out that, at his death, Kirk B. Touchton left property as follows: Life insurance policy number one hundred and eleven thousand and sixty-two, of Knights of Honor Lodge number one thousand seven hundred and one, Gainesville, Texas, for two thousand dollars, payable to Thomas A. Touchton; life insurance policy number fifty-five thousand five hundred and fifty-two, of the Texas Benevolent Association, for two thousand dollars, payable to Etna M. Touchton, and about five hundred dollars in money due said minors from Touchton, at Gainesville, Texas; that the said insurance companies were ready and prepared to pay the said policies upon the qualification of any person authorized by law to receive the payment; that said minors had no legal guardian, and that petitioner, who was their uncle, applied for appointment at the request of their mother.

3. The bond of Thomas A. Moody as the guardian of the estate of Thomas A. Touchton, minor, filed February 11, 1884. The said bond is in the sum of four thousand five hundred dollars, conditioned that the said Thomas A. Moody shall well and truly perform all the duties devolving upon him as such guardian. The said bond was signed by T. A. Moody as principal, and by S. C. Nisbet, L. C. Gilmore, C. F. Schweer, J. P. Klein and J. W. Gray as sureties, is approved by the county judge, and bears as indorsement the oath of the said Thomas A. Moody to well and truly perform the duties devolving upon him as such guardian.

4. The like bond of defendant as guardian of Etna M. Touchton, minor, filed on the same day, conditioned as the first bond and signed by the same sureties.

5. The petition of S. A. Touchton for the removal of Thomas A. Moody from the guardianship of the said minors and their estates, which reads as follows: “And now comes S. A. Touchton, the uncle of the said Thomas A. and Etna M. Touchton, the minor children of Kirk B. Touchton, and moves the court to remove Thomas A. Moody, the guardian of the persons and estate of said minors, for the following reasons, to wit:

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"First, Because the said guardian has failed, neglected and refused to return within thirty days after qualification an inventory and list of the claims of the estate, as far as the said property has come to his knowledge since said appointment and qualification, as required by law.

"Second. Because he has good cause to believe and has been credibly informed that said Moody has collected the money due on the insurance policy, and has applied the same to the payment of debts contracted by said guardian in his own individual business for the purpose of speculating and advancing his own interests, and that the money collected on said policy has been and is being misapplied by said guardian to said business, and invested in cattle and placed in the Indian Territory, out of the jurisdiction of said court and beyond the limits of the State of Texas. Wherefore he prays that the said guardian be removed, and that he be required and compelled to pay all of the money collected on said policy, and all other moneys belonging to said estate, into said court, together with a list of the property of every kind belonging to said estate, instanter, and that the same be disposed in the future by the order of said court, as we will ever pray.

"S. A. TOUCHTON,

"By CHARLES CRENSHAW, Attorney."

6. The citation issued upon the foregoing petition to the said Thomas A. Moody, issued May 30, 1884, and returned executed on June 17, 1884.

7. The following report, filed August 18, 1884:

"THE STATE OF TEXAS, } In County Court, August Term, 1884.
County of Grayson. }

Estate of Kirk B. Touchton.

Now comes T. A. Moody, as guardian of Thomas A. and Etna M. Touchton, and makes this, his first annual report:

He charges himself with the amount of cash which he received as guardian of the above named children, to wit, four thousand five hundred dollars, which is all the property he ever received belonging to said minors.

He credits himself with the following amounts which he has paid:

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To A. J. Thompson, clerk Cooke county court, as costs. (Voucher 1)	\$2 90
To Blanton & Blanton, attorney's fee. (Voucher 2).....	25 00
To A. B. Person, attorney's fee for getting out guardian- ship papers, for which he will get voucher.. ..	25 00
He has paid the following amounts to Mrs. Touchton, the mother of said children, for their and her support while taking care of them, which will appear by voucher 4, herewith filed:	
January 12, 1884	15 00
February 24, 1884.....	25 00
February 24, 1884.....	25 00
March 8, 1884.....	25 00
March 15, 1884.....	15 00
March 18, 1884.....	10 00
March 29, 1884.....	20 00
April 2, 1884.....	10 00
April 11, 1884.....	25 00
April 14, 1884.....	12 00
April 21, 1884.....	10 00
April 28, 1884.....	10 00
May 10, 1884.....	35 00
May 27, 1884.....	15 00
June 7, 1884.....	30 00
June 18, 1884.....	7 50
June 27, 1884.....	12 50
July 3, 1884.....	10 00
July 14, 1884.....	10 00
Paid to Mrs. Touchton to assist in buying house for use of herself and children, including said wards.....	50 00
Paid R. R. Dulen for furniture for said house for Mrs. Touchton and children.....	50 00
Paid for improvement on place used by Mrs. Touchton and children.....	15 00
Bought cow for use of said wards.....	30 00
	<u>\$519 90</u>

He has allowed a claim in favor of Dr. S. E. Nisbet for
fifty dollars for medical services rendered his said wards \$50 00

He has also allowed a claim for twenty-five dollars in
favor of C. N. Buckler, fees for advice and making this
report..... 25 00

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He is entitled to his commission on four thousand five hundred dollars, which he received after he was appointed guardian, which is.....\$215 00

All of the above sums added together make a total of eight hundred and nine dollars and ninety cents, which, deducted from the principal received, to wit, four thousand, five hundred dollars, leaves a balance due to the said wards of three thousand, four hundred and ninety dollars and ten cents.

“Believing he had the right to do so, the guardian reports that he invested the remainder of said money in cattle, sheep and goats, but, owing to the decline in the market value of such stock, and the loss by death of many of said animals, he is not now able to turn said money into court, or to report the same as being on hands. He has, or will soon have, one good note of about six hundred dollars, arising from the sale of a portion of the cattle purchased with said money, which note is perfectly solvent, which he asks to be received by the court as part of the assets of the said minors’ estates, and that he receive a credit for the same. That, in using this money in the way he did, he did so by the advise of counsel, and, thinking, as he had given a good bond for it, he had the right to use the same as he pleased. He says that he will sell everything that he has and turn the same into cash, if the court will grant him a little time to do so, and thereby will be able to pay into court a large proportion of the amount due said wards. He therefore prays for time to make his final report, and that the above items be allowed him.

T. A. MOODY, Guardian.”

Subscribed and sworn to.

8. The application of Henry Hulen for appointment as guardian of the estate of the minors Thomas A. and Etna M. Touchton, vice Thomas A. Moody, removed, which application, filed September 8, 1884, sets out the removal of said Moody, describes the estates as described in the original application of said Moody, less eight hundred and nine dollars and ninety cents claimed by Moody in his first annual report, and recites that the application is made upon the request of S. A. Touchton, the uncle of said minors.

9 and 10. The bonds of the said Hulen as guardian, signed by said Hulen as principal, and by John T. Walker and E. C. Peery

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as sureties, one filed October 16, 1884, and the other November 10, 1884, and each being in the sum of four thousand dollars.

11. The order of the county court appointing Thomas A. Moody guardian of the estates of the said minors, entered on the eleventh day of February, 1884.

12. The following order of the county court:

“Estate of Thomas A. Touchton et al., mi- }
nors, Thomas A. Moody, guardian. } May 21, 1884.

“It appearing to the court that a complaint has been filed in this court alleging a failure on the part of said guardian to report and file an inventory, and of his misappropriating the funds of said estate, it is ordered that said guardian be cited to answer said complaint within twenty days after adjournment of this court.”

13. The order removing the said Thomas A. Moody as the guardian of the said estates, which said order, caption omitted, reads as follows:

“It appearing to the court that T. A. Moody, guardian of the estate of Thomas A. and Etna M. Touchton, minors, has failed to file an inventory and make report of his acts as such guardian, and answer charges as required by order of this court, as shown in book N, at page 176 of the probate records of this court, it is ordered by the court that the said Moody be and he is hereby removed from the guardianship of said minors, and C. W. Moore is hereby appointed receiver of the estate of said minors, with the power to call upon said Moody for an account of all his acts as guardian of said minors. It is further ordered, that said C. W. Moore enter into bond in the sum of eight thousand dollars as receiver of the estates of said minors. It is further ordered by the court that citations issue to the sureties on the bond of the said Moody as guardian aforesaid, commanding them to appear at the October term, 1884, of this court, and show cause, if any they have, why judgment should not be had against them for all property and funds that have passed into the hands of said Moody as guardian, and for all damages resulting to the estates of said minors by reason of the acts and conduct of said Moody.”

14. The order of the county court appointing H. Hulen guardian of the estates of the said minors, entered October 13, 1884. The instruments numbered in this report as five, six and thirteen

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are the instruments specifically involved in the first ruling of this court on this appeal.

H. Hulen was recalled by the State, and testified that he knew the father of the Touchton children in his life time. Their said father, Kirk B. Touchton, was a Knight of Honor, and belonged to the same lodge to which the witness belonged, and which was located at Gainesville. The said Touchton was drowned in Red river in December, 1883. His wife and children then lived in Gainesville. The life of the said Touchton was insured in the said Knights of Honor for the sum of two thousand dollars. When the defendant, who was the brother of Mrs. Touchton, the widow of Kirk Touchton, deceased, first began trying to secure the guardianship of the minors, he moved his said sister and her said children from Gainesville to Sherman. The witness was one of the trustees of the Knights of Honor lodge to which Kirk Touchton belonged. That lodge, about the first or middle of March, 1884, paid to the defendant, as the guardian of the estate of the said minors, a check for the sum of two thousand dollars, which was good for that amount at any of the banks, and was of the value of two thousand dollars in the lawful money of the United States. That check was paid to the defendant as guardian of the estates of the said minors, and as the property of, and for the benefit of, the said estates. When the said check was paid to the defendant, he, defendant, the widow of Kirk Touchton and the said minor children were living in Grayson county. When the defendant demanded the payment of the said life insurance policy, the witness and his co-trustees of the said lodge informed him that they had arranged to loan the money to a responsible party in Gainesville, on ample real estate security, at twelve per cent per annum interest, payable annually, until the oldest child should reach majority, and recommended the said loan to him as a safe and profitable investment of the money. Defendant refused to entertain the proposition, and did not make the loan recommended, but witness could not remember what he said about it. When the witness was appointed to the guardianship of the Touchton children, then about eight and six years respectively, he made a demand upon the defendant for the funds in his hands belonging to the estate. He only got an uncollectable note for seven hundred dollars on one Witherspoon, and seven hundred and sixty-six dollars and seventy-five cents from each of defendant's four bondsmen, except two hundred and sixty-six dollars and seventy-five cents of Doctor Nisbet's part,

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which has not yet been paid. Witness recovered about one hundred and ninety dollars for cattle sold in Jack county. Witness was now the guardian of the Touchton minors, and was now living in Sherman.

J. W. Gray testified, for the State, that he knew the defendant. Before the appointment of the defendant as the guardian of the estate of Thomas A. and Etna M. Touchton, minor children of Kirk B. Touchton, deceased, was made out, the defendant came to witness and asked the witness to sign his guardian bond as surety, which, he said, was merely a form required by law; that he could not use or invest the funds of the estate except under the express order of the probate court, and that, when so used or invested by the order of the court, the said order would protect the bondsmen from loss. It was the recollection of the witness that defendant then said something about investing the estate funds in cattle under order of court. The witness, at that time, was somewhat interested in the defendant's affairs, and finally, when defendant appeared to encounter trouble in making the bond, the witness signed it as a surety. Defendant at that time owed the witness about one thousand four hundred dollars, to secure the payment of which he had executed to the witness a mortgage on one thousand head of sheep and goats, which he claimed to own in Jack county. At the same time the witness was on defendant's note to the City Bank of Sherman for one thousand dollars, and he, defendant, then owed the said bank about six hundred dollars besides. He then owned some wagons and eight or ten horses, and claimed to own three hundred head of cattle in the Dodge pasture, near Sherman. The bond was approved, and defendant assumed the guardianship of the estate.

Some time in May, 1884, witness heard some unfavorable reports about the defendant's management of the estate, and went to defendant about it. Witness knew that defendant had received two thousand dollars from the Gainesville Knights of Honor for the estate, and asked what he had done with that money, and what other moneys had come to his hands for the estate. He told the witness that he had not then used the money, and that he was then on his way to the court house to get an order on which to collect a policy of two thousand dollars due the minors from the Texas Benevolent Association at Waco. He said that he could collect the said two thousand dollars by getting the proper papers and going to Waco for it; and he did go to Waco, either on that night or on the next day. When he came back

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from Waco the witness went to his house to see him, and asked him how he succeeded, and told him that Judge Bledsoe, the president of the Sherman City Bank, had refused to take Witherspoon on the debt owed by defendant at the said bank, including the one thousand dollar note on which the witness was security. Defendant replied that he did not collect the two thousand dollars in Waco, and that, if he had, he could not use it without an order of court. Witness then told him that he must arrange the money matter at the bank, and he replied that he would do so that day. On that same day the defendant, giving Witherspoon as security, got the money from the Merchants and Planters Bank, in Sherman, and paid off his debt at the City Bank. Witherspoon was a cattle man, who then and now owned cattle in the Panhandle, Greer county and the Indian Nation. He made his headquarters in Gainesville. The bondsmen soon found they would be held on the defendant's guardianship bond, and got together and had a conference with defendant. He agreed to surrender all of his property to the said bondsmen, who got only the cattle in Dodge's pasture, which, on actual count, numbered only two hundred and fifteen head, which was covered by a mortgage in favor of Witherspoon, who finally got them. It took all the sheep and goats, about two hundred and fifty head of each, to pay the mortgage of one thousand four hundred dollars which the witness held on them. On a compromise, concurred in and consented to by defendant, the bondsmen surrendered all claim against the cattle, and agreed to pay each (there being four bondsmen) seven hundred and sixty-six dollars and seventy-five cents, and Witherspoon gave his note for seven hundred dollars to H. Hulen, the newly appointed guardian. Witness paid his part. About fifteen head of cattle in Jack county were turned over to Doctor Nisbet, to be sold for the benefit of the estate. They realized about one hundred and ninety dollars. Defendant "showed up" no other property. He claimed to own that property when the witness signed his bond. He claimed that the cattle in the Dodge pasture numbered three hundred and eighty-five head, and when they counted out only two hundred and fifteen head, he offered no other explanation than that seventy head must have escaped from the pasture. He claimed the said cattle, sheep and goats as his property, and never as the property of the estate of the Touchton minors. He denied that he had any cattle in the Indian Territory. He told witness that he invested the estate money in cattle, but never

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said how many he bought, how much he paid, from whom he bought, or where the said cattle were. He had never refunded a dollar paid by witness on his bond. His reputation for honesty was good up to his management of this estate.

Charles Dorchester testified, for the State, that he was the cashier of the Merchants and Planters bank of Sherman. The defendant deposited in the said bank, on the thirtieth day of May, 1884, the sum of one thousand nine hundred and eighty dollars in money, which, he said at the time of deposit, he got at Waco. The said money belonged to the estate of the Touchton minors, and was in the hands of the defendant as the guardian of said estate. On the same day the defendant, on his note, signed by Witherspoon as surety, borrowed of the bank the sum of one thousand five hundred and eighty dollars in money. All of the money referred to was deposited in the name of T. A. Moody. On that same day the defendant drew from the bank the sum of eight hundred and forty dollars. On the next day he drew, in five different checks, the sum of two thousand four hundred and ninety-nine dollars. He drew small amounts every day until June 9, when his account was found to be overdrawn to the amount of thirty-six dollars. On the fourteenth of the said June he deposited with the bank the sum of thirty-six dollars, previously overdrawn, and closed his account with the bank, and has had no account or deposit with it since. He never did have an account with the bank as guardian. His account was strictly individual. Witness did not know what he did with the moneys he deposited with, borrowed from and drew out of the bank. His checks were returned to him shortly after his account was closed. The deposit of one thousand nine hundred and eighty dollars was a draft on a Waco bank, for which, he said, he had discounted a two thousand dollar claim. Witherspoon paid the one thousand five hundred and eighty dollars obtained by defendant from the bank, and it was the understanding of the witness that he, Witherspoon, got the defendant's cattle.

J. P. Klein testified, for the State, that he was one of the sureties on the defendant's bond as guardian of the estate of the Touchton minors. As such bondsman he had paid seven hundred and sixty-six dollars and seventy-five cents, the amount assessed against him to make up the defendant's liability to the estate. The other three bondsmen paid a like sum. Witness had never been reimbursed, either in whole or in part, for the sum so paid

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by him. Witness, on or about May 24, 1884, heard that there was trouble brewing about the management of the estate, and went to see defendant about it. He found the defendant at the court house door, going to the county judge to get authority to draw the two thousand dollars at Waco due from the Texas Benevolent Association. Defendant then told witness that there was no truth in the rumors affecting the estate, and that he had as yet got no money belonging to the said minor children. The defendant, when he asked witness to sign his bond, told him that such bond was merely a form required by law, and that the money coming to the estate could only be applied under order of court, which order would protect the sureties. Witness knew of one visit that defendant paid to the Indian Territory in the spring of 1884, and he went to Jack county several times. When he went to the Indian Territory on the occasion referred to by the witness, he said that he was going to look after the interests of his wards. Witness did not know what the defendant did with the money of his wards. Witness knew of no cattle owned by defendant except those he had in Grayson county.

Charles Crenshaw testified, for the State, that he was the attorney employed by the uncle of the minors, Thomas A. and Etna M. Touchton, to contest the defendant's application for the appointment of guardian. After the defendant's appointment a contest was made on his bond, and he was compelled to execute a new bond. Late in April, 1884, the witness met the defendant in Sherman and told him that he, witness, had been employed by the uncle of the children to examine into current reports affecting his management of the Touchton estate. Defendant replied that he had received the two thousand dollars due from the Gainesville Lodge of Knights of Honor, and about three hundred dollars from the estate of Kirk Touchton, deceased. Witness directed him not to use any of those moneys either for himself or for the children, without an order of court, and warned him if he did his bondsmen would be held liable and he would commit a penitentiary offense. When the witness, two or three weeks before he filed the complaint in the county court, told the defendant that he was reported to be buying cattle, sheep and goats with the money of his wards, he denied it.

Joseph Bledsoe testified that he was the president of the City Bank of Sherman, and held that position in 1884. The defendant did not have an account at that bank as an individual, nor as guardian of any estate, in 1884, nor at any other time. He at

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one time owed the City Bank, and, on the thirtieth day of May, 1884, he settled that debt with money which he said he obtained from the Merchants and Planters Bank, on paper signed by Witherspoon as security. Witness had long known the defendant. Prior to this estate matter, the defendant's reputation for honesty was good.

C. N. Buckler testified, for the State, that he was the attorney of the defendant in this case, and acted as attorney for him in making his report as guardian. The witness knew of no other report of the defendant as guardian than that in evidence. Defendant made to witness, at the time of making that report, no statements other than those embodied in the report. Witness did not know what defendant had done with the money of the Touchton heirs. Cross examined, the witness stated that defendant came to his office on the day the report was made, and told witness that he wanted him to prepare the said report; that he was not able to turn the estate money into court, as he had invested and lost it. He said that he bought cattle, sheep and goats with it, but many of the goats and sheep died, and the cattle had greatly depreciated in the market. Witness then told defendant that if he could not report the money on hand, he had better report the facts as they existed, and accordingly witness prepared the report in evidence.

S. D. Steedman testified, for the State, that he was county judge of Grayson county, in 1884. He never as such county judge or otherwise authorized the defendant to use the funds belonging to the estate of the Touchton heirs, of which he was guardian. Witness told the defendant that he could apply the money only by order of the court, and that it must be invested or witness would charge him with interest on the same, and that he always exacted twelve per cent from guardians who failed or neglected to properly invest their trust funds. Defendant then said that he wanted to invest the money in cattle. Witness told him in reply that it might pay to so invest it, but that such investment would have to be approved by the court. He never applied to witness for an order to invest the funds in any way. Witness instructed the defendant fully as to the law which should govern his transactions as guardian. On his cross examination, the witness said that he told defendant that guardians had failed to invest the funds of their wards, and that he had taxed them twelve per cent interest on the funds on hand. He spoke of the case of J. H. Britton, the guardian of the Lemon

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heirs, who reported certain uninvested trust funds on hand, and who, when the witness taxed him the twelve per cent interest, paid it.

The State rested.

S. C. Nisbet was the first witness for the defense. He was one of the sureties on the defendant's guardianship bond, and as such had paid the amount of the deficit assessed against him. He had known the defendant for eight or nine years, during which time the defendant had maintained an excellent reputation for honesty and fair dealing. The witness knew that the defendant purchased some cattle in 1884, and that the price of cattle declined greatly in the winter of 1883-4. Defendant, when he was removed from the guardianship of the estate of the Touchton minors, had about four thousand dollars worth of cattle in the Dodge pasture near Sherman. Witherspoon had a claim on them. They formed the basis of a compromise between the sureties and Witherspoon, the defendant and Hulen, his successor as guardian concurring. Defendant followed wood hauling after he was broken up in business, and continued to follow that business for some months after he was removed from the guardianship. The price of cattle began to fall in the winter of 1883. Witness was interested in the cattle business to some extent, and sold cattle in 1884 for fifteen dollars per head, for which during the previous year he could have gotten twenty dollars per head. Witness was at the defendant's ranch, in Grayson county in 1884, and saw the cattle belonging to the defendant, which, he was satisfied, were then worth at least four thousand dollars. In the spring and summer of 1884, the defendant bought fifty head of cattle from Gudgell, in Grayson county. After the removal of the defendant from the guardianship, all the cattle described were turned over to witness as the representative of the sureties, and witness sold them to Witherspoon. The sureties knew at that time that Witherspoon had a claim on the cattle, but they undertook the liquidation of that claim in order to secure the benefit of whatever margin over the amount of the debt could be realized. That amounted to seven hundred dollars, for which Witherspoon executed his note, which note the new guardian accepted in part liquidation of the claim against the bondsmen. A few cattle in Jack county were turned over to the sureties by the defendant. Defendant went to Jack county and brought those animals to witness. A few head were also found at large in Grayson coun-

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ty, and were turned over to the sureties by the defendant. The fence around the Dodge pasture, in which defendant kept his cattle, was a very poor one. It was but three wires high, and some of the posts were down.

Cross examined, the witness said that he was not present when defendant bought the Gudgell or any other cattle, nor did he know the exact date of the Gudgell or any other purchase. Gudgell was living about three miles from Sherman, but witness could not explain why he was not in court to testify. He did not know whether the defendant bought the Gudgell cattle with money he saved from his grocery business or not. The twelve head of cattle found at large were animals that escaped from the Dodge pasture. Defendant executed to his sureties a mortgage on his property. Witness knew of no other property owned by defendant than that embraced in the mortgage. The witness still owed the guardian of the Touchton heirs two hundred dollars or over, which was amply secured. Defendant had never settled with or reimbursed the witness in secret. The mortgage referred to by the witness was introduced in evidence. It reads as follows:

THE STATE OF TEXAS, }
County of Grayson. }

In consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, I, T. A. Moody, the undersigned, have this day sold to S. C. Nisbet, of Grayson county, Texas, one thousand head of sheep and goats, now in Jack county, Texas, about eight miles from Jacksboro, and in the charge of Jesse Taylor; twenty-eight head (more or less) of stock cattle in same county and place, branded TUT and TXM. The above mentioned sheep are sold on conditions hereinafter mentioned, and to the legal rights of J. W. Gray, under a bill of sale he holds for them. Three hundred and thirty-five head of cattle, some of which are in Mrs. Dodge's pasture, some in the city of Sherman, being stock cattle branded GUS. This includes all the cattle except sixty-five head sold to Mathews; ten head of horses, now in Grayson county, to wit, one roan horse, two bay horses, one five and the other six years old; two brown horses, one seven, the other eight; one roan, nine years old; one bay horse, eight years old; one bay mare (and colt), four years old; one two horse wagon and harness; nine acres potatoes and onions now in the ground, to be dug and marketed by Moody and the proceeds paid to Nisbet, he to hold the same on deposit,

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subject to the conditions of the obligation. This sale and conveyance, however, is intended as a trust as the better securing J. W. Gray, J. P. Schweer, G. P. Klein, L. G. Gilmore and S. C. Nisbet, who, on or about the eleventh day of February, 1884, subscribed their names upon two certain guardian's bonds, given by said T. A. Moody as principal, in the county court of Grayson county, Texas, each for the sum of forty-five hundred dollars, as guardian for — Touchton and — Touchton. Now, if the said T. A. Moody, as guardian of said children, shall fully account, pay off and discharge all liabilities against him that may now or hereafter arise under said bond, and receive full acquittance for all sums that he may be liable to said children for, from the proper person or legal authority, then in that case this transfer and conveyance shall become null and void; but until such settlement and payment is fully made, the said S. C. Nisbet, as trustee for the sureties aforesaid, shall have the title and ownership of the above property, and in case of default or failure to account for and pay all or any part of said bonds, and these sureties shall become liable to pay all or any part of said bonds, then in that case the said S. C. Nisbet, trustee as aforesaid, shall take possession of the said property, and the said T. A. Moody agrees to surrender and deliver possession of same in good order to said Nisbet, or any one thereunto authorized by him, and if he deem fit, to sell the same at public auction or at private sale, either with or without possession. In case, however, of public sale, the same shall be sold in front of the court house door, in the city of Sherman, Grayson county, Texas, first giving ten days notice by posting the same, at the court house, or by personal notice to the said Moody. Either party may become the purchaser of the said property. Such of said property as can be conveniently brought to said sale shall be there exposed; such as can not shall be sold as it runs. The proceeds of such sale, whether public or private, after deducting costs and expenses, shall be applied to the payment of any sum of money the said sureties or either of them shall have to pay, or have paid, or be liable to pay, on both or either of said guardian bonds. And it is further stipulated that said property shall not be sold, encumbered, or removed out of the county of Grayson or Jack, until the matters herein are settled. Any surplus over liabilities and costs are to be refunded to the said Moody.

"Witness my hand, this 22nd day of July, 1884.

"T. A. MOODY."

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Mrs. Mary E. Wood testified, for the defense, that she was the sister of the defendant, and the mother of the minors, Thomas A. and Etna M. Touchton, now the wards of H. Hulen. Witness brought the said children to Sherman about February 1, 1884. Defendant, who was dealing in cattle in 1884, told witness that he was going to invest her children's money in cattle. Mr. Persons was then the defendant's legal adviser. Witness and defendant discussed the investment of the children's money, and concurred in the opinion that the interests of the children could be best subserved by investing the money in cattle. Witness knew, as a matter of fact, that defendant purchased cattle after he got the children's money. Witness was living in Gainesville when her husband, Kirk Touchton, died. On her cross examination, the witness declared that she did not live on her children's money in 1884. She did not arrange with defendant to use that money. She did not agree with defendant that the said money should be used between her and defendant. She did not pay for her house with the money, nor any part of the money, of her children. She did not buy any furniture with their money. She did not use any of their money, except a few dollars with which she paid a doctor's bill, and to procure a few necessities for the said children. Witness's attention was here called to the defendant's report as guardian, and particularly to the items of cash furnished her to the amount of about sixty dollars per month for six months, fifty dollars paid on her home, fifty dollars to Dulen for furniture, fifteen dollars for repairs, and thirty dollars for a cow. Asked to explain these matters, the witness remained silent until pressed by the State's counsel, when she replied: "I can't say about the cash, but he did buy me some furniture, and did pay fifty dollars on my house, which I afterwards sold, and did not pay any part of the money back to the children's estate. Mr. Touchton died in December, 1883, and I married Mr. Wood in August, 1884. The four thousand dollars insurance on Touchton's life was for the children in their own right. Defendant collected it all. I had two other children by a former husband. We lived on the money that the defendant gave us in the spring of 1884, and what I had. I had no other income except twelve dollars and fifty cents per month rents, and did not collect all of that."

Joseph Argo testified, for the defense, that he worked for the defendant up to and for some time previous to May 1, 1884. When witness left defendant's employ, defendant had three hundred and

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twenty-five head of cattle in the Dodge pasture. The fence around that pasture was a very poor one. Witness clerked for the defendant when he was in the grocery business. Defendant bought the said cattle after he went out of the grocery business. The witness never, at any time, drove any cattle to the Indian Territory for the defendant, and he knew of none having been driven to that Territory for the defendant.

The defendant's wife testified, in his behalf, that she knew the defendant dealt in cattle in 1884. He had at least one hundred head of cattle in his lot in Sherman, during that year. He had no cattle in the Indian Territory, nor did he visit the Indian Territory during the year 1884. Defendant had no property left over his assignment to the sureties on his bond.

On her cross examination, witness said that defendant went into the grocery business after he quit the wood hauling business. She did not know of her own knowledge where he got the money with which he bought his stock of groceries. She did not know of her own knowledge of whom he purchased cattle, nor what, if he ever had any, became of his bills of sale.

Grove Henry testified, for the defense, that he had known the defendant since 1878. Defendant's business, at present, was that of clerk in the grocery store of his sister-in-law, Miss Laura Hopson. His reputation for honesty, prior to the transactions arising out of his management of the estate of the Touchton minors, was good.

R. E. Smith testified, for the defense, that he had known the defendant for several years, and knew that his general reputation for honesty in Sherman was good.

Messrs. Cole and Warrick testified that, prior to the troubles arising out of the estate matters, defendant's reputation for honesty in Sherman was good.

Charley Newton testified, for the defense, that he had the Dodge pasture rented during the year preceding the year it was rented by the defendant. The fence around that pasture was a poor one, and the witness, although he kept men on guard, lost thirteen head of cattle by escape.

Gus Moody, the defendant's brother, testified that he knew as a matter of fact that defendant had three hundred and twenty-five head of cattle in a pasture in the spring of 1884. He bought those cattle during that spring, which was after he retired from the grocery business.

Miss Laura Hopson testified, for the defense, that she owned

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the grocery establishment which the defendant was now managing. Defendant had no interest in that business other than as employe on a salary. He never invested a cent in that business.

On her cross examination the witness stated that defendant began business for her in April, 1886, on one hundred and twenty-five dollars furnished by witness. She had since drawn about one thousand five hundred dollars from the establishment, and now owned the stock, which was a good one. She had paid and was paying defendant one thousand dollars per annum for his work. He was exclusive manager of that business. Witness managed the book store, in which she owned a one-half interest, worth about one thousand dollars. Defendant's wife knew all about her husband's business.

The defense rested.

A. B. Persons testified, for the State, in rebuttal, that he was an attorney at law, and was employed by defendant to get out the guardianship papers for him. Witness's employment ceased with the defendant's appointment. Witness never advised with defendant about the investment of the trust funds. Defendant once said something about investing the money in cattle, and witness referred him to the county judge.

The State closed.

Mrs. Mary Wood, recalled by the defense, in rebuttal, testified that she heard the defendant tell lawyer Persons that he thought of investing the trust funds in cattle. Persons replied, in effect, that he thought the investment a safe and good one.

Grove Henry, recalled, testified in behalf of the defense that the grocery store managed now by the defendant was conducted in the name of Miss Laura Hopson. The firm represented by witness had sold that establishment (Miss Hopson's) six thousand dollars worth of goods since defendant opened it; six hundred dollars worth of which was sold during the month preceding this trial.

The motion for a new trial raised the questions discussed in the opinion.

Gilbert, Pasco & Russell, and *C. N. Buckler* and *J. D. Woods*, filed separate briefs and arguments for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. It was error to admit in evidence against

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the defendant the petition, citation and judgment referred to in bill of exception No. 3. These matters were hearsay, were in no manner relevant to the issue on trial, and tended in no degree to throw legitimate light upon that issue. They were not admissions, either express or by acquiescence, made by the defendant. We know of no rule of evidence which rendered them admissible for any purpose, and the recitals and statements therein contained are such as would be very likely to improperly influence the minds of a jury adversely to the defendant. (1 Greenleaf Ev., secs. 537, 538, 539; Pinckford v. The State, 13 Texas Ct. App., 468; Allison v. The State, 14 Texas Ct. App., 402.)

But, even if the said testimony had been admissible for the purpose named by the learned trial judge, it was material error to fail to instruct the jury that it could be considered by them for that purpose alone. (Pinckford v. The State, supra; Mayfield v. The State, 23 Texas Ct. App., 645; Whalen v. The State, Id., 598, and cases there cited; Maines v. The State, Id., 568.)

We are not prepared to say that the testimony of the witness Hulen is incompetent. As a circumstance bearing upon defendant's intent in relation to the fund in his charge, we think it was admissible, although remote.

With respect to the charge of the court, it is not materially erroneous except in the particular above mentioned. When considered as a whole, it sufficiently and correctly explains the law of the case.

Because the court erred in the admission in evidence of the petition, citation and judgment referred to in defendant's bill of exception No. 3, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered December 14, 1887.

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No. 2743.

SAM GENTRY v. THE STATE.

1. **THEFT—EVIDENCE.**—See the statement of the case for evidence upon a trial for theft *held* to be inadmissible, because hearsay.
2. **SAME—PRINCIPAL OFFENDERS.—CHARGE OF THE COURT** instructed the jury to "find the defendant guilty if he and Homer Smith were acting together fraudulently, and the horses were taken by either of them." *Held*, erroneous. The charge should have been to the effect that, to constitute the defendant a principal in the theft, he must have taken the horses himself, or must have acted together with Homer Smith in committing the theft, knowing at the time the fraudulent intent of said Smith, and, if not present with Smith at the time of the commission of the theft by said Smith, must have been acting with him at the very time of the commission of said theft in pursuance of a common design existing between them to commit the theft.

APPEAL from the District Court of Falls. Tried below before the Hon. Eugene Williams.

The conviction was for horse theft, and the penalty assessed was a term of five years in the penitentiary.

Bob Hineman, the first witness sworn for the State, testified that he was the son of S. Hineman, and lived at Blue Ridge, in Falls county, Texas, about four miles distant from the house of the defendant. Mr. William Nance, the owner of the alleged stolen animal, lived with the witness. S. Hineman, the witness's father, owned a gray mare and a gray gelding, whose range, when at large, was on and across the little Brazos, in Falls county, Texas, covering a distance of three or four miles from the residence of the witness. William Nance had a sorrel horse which ran with S. Hineman's two horses. The horses thus described were taken from their said accustomed range on or about June 19, 1886. The Hineman mare had a bell on when she disappeared. On the twenty-second day of June a man named Popenjoy found the bell and brought it home. The gray mare was a very large animal, fully sixteen and a half hands high. Witness and John Walker commenced the search for the said animals on the twenty-third day of June. They went first to Marlin, in Falls county, and thence to the Brazos, and thence, upon information there obtained, they went to Gatesville, in

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Coryell county, and thence through Hamilton county to Brady City, in McCulloch county, at which latter place they found the defendant and one Homer Smith in jail.

Witness found the gray mare in Brady City, at which place he also found the dead body of the sorrel horse mentioned in this indictment. He got the gray horse in Hamilton county. Witness and Walker, having a warrant for the defendant, received him and the gray mare from the sheriff of McCulloch county. They returned at once to Falls county, where they placed the defendant in jail. At the same time, witness and Walker brought back with them a small gray filly, branded TG, which they turned over to the defendant's father. Witness and Walker followed the defendant upon information received at Marlin, and at the various points through which they passed. The animals described by witness, and which were recovered in Hamilton and McCulloch counties, belonged to witness's father, and the sorrel horse which they found dead in McCulloch county belonged to William Nance. They were gentle work stock, and had been turned on the range after the harvest of the crop. It was about seventy-five miles from the witness's father's in Falls county to Gatesville, in Coryell county.

Before starting to Gatesville witness got process for the arrest of defendant and Homer Smith, from Justice Boyles, of the Reagan precinct, the same being issued upon affidavits filed by the owners of the stolen stock, and witness was specially deputized to arrest the defendant and Smith. When recovered, the gray animals were very much jaded from hard riding. The Nance horse lost his hoofs, and at last his life, from the hard riding.

James Lanham testified, for the State, that he was the sheriff of Coryell county. On the twentieth or twenty-first day of June, 1886, witness was in the town of Gatesville, when he was called upon by a banker to examine some horses which were being offered for sale. Witness and constable Hammack went to a point near a livery stable where the defendant had his horses. He then for the first time saw the defendant to know him. Defendant then had in his possession a gray gelding worth about seventy-five dollars, which he was offering to sell for sixty dollars, and a small gray or roan filly, worth about twenty-five, which he was offering to sell for sixteen dollars. Witness's purpose in going to the livery stable was to question the defendant, examine the horses, and ascertain if he could, whether or not the de-

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defendant was a horse thief, and whether or not the horses were stolen animals. No person was with the defendant when witness saw him in possession of the horses in Gatesville. Accordingly he questioned defendant closely. Defendant said that he came from some one of the lower counties, other than Falls, and that he was going to his uncle's in Hamilton county, and was taking the horses with him. He was riding the gray gelding, and was leading the little filly which was branded TG. The witness reached the conclusion that there was nothing crooked about defendant, and did not molest him. The horses had the appearance of having been ridden hard. Defendant was "sharp" enough to deceive the witness; he talked well, and did not impress the witness as a dull boy. Witness saw no indications of a disordered mind in his interview with the defendant. Defendant appeared to be about seventeen years old. A few days after the interview with defendant, Bob Hineman and John Walker passed through Gatesville in pursuit of defendant and the horses, and witness gave them such information as he could. During the interview with witness, defendant said that he got the gray gelding at Coryell City. That animal was branded 9S.

Constable Hammack testified, for the State, substantially as did Sheriff Lanham, and in addition that the defendant gave the name of his alleged uncle who, he said, lived in Hamilton county, and to whose house he was then going. Witness could not remember the name, but had lived in Hamilton county himself for a long time prior to his interview with the defendant, and had never known a man of the name given by defendant. A few days after defendant left, Bob Hineman and John Walker passed through Gatesville in pursuit of defendant and the horses. A few days later they passed through Gatesville on their return to Falls county, having in custody the defendant and one Homer Smith, whom witness had never seen before, and the horses which defendant had in his possession in Gatesville. The witness discovered nothing in the conduct, talk or deportment of the defendant, while talking to Sheriff Lanham, indicating that his mind was in the least disordered. He impressed the witness as being the reverse of a dull boy.

S. Hineman testified, for the State, that his gray mare and gray gelding, and Nance's sorrel horse, ranged together on Willow creek, near the Little Brazos river, in Falls county, for some time, and until about June 19, 1886, when they disappeared together. The witness's gray mare was branded CT, and his gray

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gelding 98. All of the animals were farm work stock, and when taken had but recently been turned on the range. Those horses had often been turned on that range, but always came up until that time. Bob Hineman and John Walker went in pursuit of the horses soon after they disappeared, and got back with the witness's gelding and mare about July 1, 1886. They also brought back with them the defendant and one Homer Smith, who was a stranger to the witness. Witness had never consented to the taking or using of his said stock by the defendant, Homer Smith, or any other person.

William Nance was the next witness for the State. He testified that he was the owner of the sorrel gelding mentioned in the indictment, and described by the previous witnesses. Witness's said animal was on his accustomed range, running with old man Hineman's work horses, on June 19, 1886, on which said day he disappeared. The said horse was branded NEP on the left hip and AT on the shoulder. Old man Hineman's gray mare and gray gelding disappeared from the range at the same time. Witness never recovered his said animal, which was taken by some person without the knowledge or consent of the witness.

John Walker was the next witness for the State. He testified that, a little after dusk on the evening of June 19, 1886, at a point on the road near Reagan, and between four and five miles from Mr. Hineman's house, he met the defendant and another man. They had several horses with them, and among them he thought he recognized old man Hineman's gray mare. The thought struck him that the animals were all mares being taken to Webb's jack. He thought no more of the matter until he was told that horses had been missed from the neighborhood. Witness went with Bob Hineman in pursuit of defendant and the horses, and in his testimony he corroborated in detail the narrative of the said Hineman.

On his cross examination, this witness was asked by the defendant's counsel if Homer Smith had been tried for complicity in this offense. He answered that Homer Smith had been arraigned, and had pleaded guilty to the indictment charging him with this same theft. On re-examination, the prosecuting counsel directed the witness to repeat what was said by Smith when he pleaded guilty. Over the defendant's objection, and by direction of the court, the witness did as directed, and said that Homer Smith, when he entered his plea of guilty, said that he and the defendant took the horses, but that he (Smith) was hired by

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Tom Gentry, the defendant's father, to take them, and that at the time of the taking it was understood that the said Tom Gentry and one Bohannon were to follow with another bunch of horses. This is the evidence which constitutes the subject matter of the ruling of this court on this appeal.

Frank Myers testified, for the State, that he lived near the town of Reagan, in Falls county, Texas. On the nineteenth day of June, 1886, he had occasion to pass the old Currie horse pen, and observed, among a number of horses penned therein, the gray mare and gray gelding of Mr. S. Hineman. He saw no parties at the pen; but near a water hole, a mile and a half beyond the pen, he saw two men, whom, because of their distance from him, he did not recognize. He saw and recognized at the water hole a certain little gray filly that belonged to the defendant. She was saddled. The water hole and the place where the men were, were not in sight of the horse pen. No one lived at the pen, nor nearer the pen than a half a mile. Defendant's father lived about a mile from the pen. The said pen was about three miles distant from S. Hineman's house.

H. C. Bohannon testified, for the State, that Homer Smith lived at his house for a month prior to the nineteenth day of June, 1886. Witness left home on the morning of the said June 19, and returned on the evening of the twentieth. Smith was then gone, and witness discovered that several small articles of personal property belonging to him, witness, had disappeared from the house. Smith was the only person the witness left at his house on the morning of the said June 19. Just before the witness left, the defendant came by the house and said that he was going to Bremond. He came to the house alone and left the house alone, going towards Bremond. Defendant and Homer Smith were then intimate associates. The house occupied by witness, and in which Smith lived with him, was on the place of Tom Gentry, the father of the defendant, and was situated a few hundred yards distant from the house occupied by the said Tom Gentry. Smith was a stranger to the neighborhood, was a hired hand of the witness, and until hired by witness, about a month before the alleged theft, had been at work on the railroad. He was about twenty-eight years old. Defendant disappeared, about the same time that Smith disappeared, and witness did not see him again until after he was arrested and brought back to Falls county and placed in jail.

The State rested.

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By agreement, the defense read in evidence the written statement of F. M. Miller, sheriff of McCulloch county, as follows: "I am now, and have been for six years next before this date, sheriff of McCulloch county. About July 1, 1886, in the town of Brady, in said county, I, as such sheriff, took into my custody a boy who gave his name as Sam Gentry. He was riding a gray or white mare, about sixteen hands high, which mare was afterwards claimed by one Hineman, a stranger to me, and delivered to him. Sam Gentry had also in his possession at the time I arrested him a dark brown or black pony. I arrested Sam Gentry on suspicion, without any warrant or writ. After I arrested him, he stated that he came from Falls county in company with a man whom he called Smith, or Homer Smith, and that he, Gentry, was going to his uncle's, I think, in Reeves county. He said that Smith was going to Mexico. He said that he left his father's place in company with Smith, who said he would take him to his uncle's. Sam said he rode his own pony until it gave out, when Smith loaned him the gray mare he was riding. He said that Smith had gone on, leaving him to complete an exchange of horses which had been agreed upon with some one in Brady. Upon this information communicated by Sam, I sent two deputies in pursuit of Smith, whom they captured next morning and brought back to Brady. I delivered Smith, Gentry and the horses to Hineman and the man who was with him, they promising to take him to Marlin. Before and after Smith was brought back to Brady, Gentry asked me not to put him and Smith together; that he was afraid of Smith, and feared Smith would hurt him. Sam Gentry told me where his father lived, and I wrote to him. He also told me that Hineman was the owner of the gray mare, and that Smith loaned her to him to ride after his pony gave out. The above conversations with Sam Gentry, in which he explained his possession of the animals, were had while Gentry was in jail and about three or four hours after he was arrested. He sent for witness to come to the jail, and made the above statements. He made no statement when first arrested."

H. W. Black, the next witness for the defense, testified, in substance, that he had known the defendant for many years. Witness was a school teacher. Defendant went to school to him about two months in 1885. Witness boarded about a year in the family of the defendant's father, and saw the defendant daily during that time. He learned, by observation, some of the

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peculiarities of the defendant's mind. Witness would compare the defendant's mind to a stationary vessel of water that would move on when moved and then only as moved. Defendant appeared to have no independent mind or thought of his own, but moved and acted as influenced by others. His prevailing habit in school was to sit for hours with his head bowed down to his knees. When admonished by witness, he would straighten up and gaze at his book, but would soon lapse into his previous state of absent mindedness. Witness labored diligently to teach defendant, but could teach him little or nothing. He could spell, and read a little when he first came to school, and witness put him in arithmetic, but could never get him through the multiplication table. He rarely, either at home or on the play ground, spoke unless he was spoken to, and would do nothing at all until directed by some one. He was an obedient and good boy, confiding and trusting implicitly in those to whom he was attached, and would believe any miraculous story that was told him. The witness, judging the defendant's mental calibre from personal knowledge of him, was of opinion that, when acting under the influence of those in whom he had confidence, the defendant was mentally incapable of knowing right from wrong. The meaning of the witness was that, if a person in whom the defendant had confidence should direct him to commit a particular crime, the defendant, in committing it, would be moved solely by the direction of the person, without knowing or appreciating the nature of the act. Witness thought that he could direct the defendant to steal an article, and that he would steal it in the confidence that he was doing an innocent act, and that it would never enter his mind that the theft was morally or legally wrong. The witness did not believe that defendant, if let alone, and not influenced by another person, would steal or do any other wrong. Free from the influence of others, the defendant doubtless knew right from wrong. He would feed stock, do chores and work when directed, and would do his work slowly but well. He was about seventeen years old, but did not have the mental capacity of an ordinary boy ten years old.

On his cross examination, this witness said that defendant attended a school in Bremond before he became a pupil of his. He rode to the school in Bremond, which was several miles from his home, alone. He used in the witness's school the same books he used in the Bremond school. A rule the witness always observed as a teacher was never to put a pupil in arithmetic until

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such pupil could read and spell well. He put the defendant in arithmetic soon after he entered witness's school, but never succeeded in teaching him the multiplication table. Defendant was a very good farm hand. If he ever chopped up or destroyed the crop in working it, witness did not know it. Witness thought that, uninfluenced, defendant would regard it wrong to steal, but witness thought that, having much influence over defendant, he could get defendant to steal by merely directing him to do it, and that defendant would not regard such theft as either a moral or a legal wrong. This, however, was merely speculation on the part of the witness, who had never attempted to get him to steal. Witness had a high, friendly esteem for the defendant and his father.

William Wyatt testified, for the defense, that he had known the defendant intimately for several years. About seven years before this trial, the witness drove his stock from Falls county to western Texas. Defendant and his father went with witness, and remained with witness, working the stock for three or four years, when witness sold out, and returned to Falls county. Defendant had been back to Falls county about two years. Witness described the mental peculiarities of the defendant substantially as they were described by the witness Black. It was the opinion of the witness that, when swayed by the influence of a person in whom he had confidence, the defendant was totally incapable of distinguishing right from wrong with regard to any particular matter. By way of example, the witness would say, presupposing that he had the defendant's confidence, that if he were to tell defendant to steal a particular article, and sell it for his, witness's, benefit, the defendant, without a conscious thought of doing an illegal or immoral act, would do as directed. Such influence, however, was exercised over defendant only by those in whom he had confidence. Independent of the influence of others, the defendant knew that theft was a moral and legal crime. Defendant would work well when told, but would do nothing unless told to do it. On his cross examination the witness said, in answer to a question, that he meant to convey the idea that, in doing wrong under the direction of some other person, the defendant would not expect to be punished. On re-examination he said that he meant that, acting under the influence of another person, the defendant did not know the right from the wrong of a given act. The defense witnesses John Perry, William Alston and Tom Gentry, the father of the defendant, testified sub-

Opinion of the court.

stantially as did the witnesses Black and Wyatt as to the defendant's mental peculiarities. They concurred in the opinion that, acting independent of any other influence, the defendant knew right from wrong, but when acting under the influence of another person he did not know a moral or legal from an immoral or illegal act. Tom Gentry further testified that the defendant was seventeen years old, and that he, defendant, owned the small TG filly brought back by Hineman and Walker from McCulloch county. When witness learned that defendant and Smith, and Hineman's and Nance's horses had disappeared, he started out to hunt defendant and Smith, and the said horses, going first to Navarro county, from which county Smith claimed to have come to Falls county, and to which county he said, shortly before he disappeared, he was going to return.

The defense closed.

John Walker testified, for the State, in rebuttal, that he had known defendant for many years. He knew defendant to be a good field and stock hand, and that he often worked in the field and with stock when there was no other person about to direct him. From what witness knew of defendant, he was satisfied that defendant knew right from wrong, and that he knew it was wrong, morally and legally, to steal.

William Nance, Henry Bohannon and Bob Hineman, testifying for the State, in rebuttal, corroborated the testimony of the witness John Walker, in rebuttal, and expressed the same estimate of the defendant's mental calibre.

The motion for new trial raised the questions discussed in the opinion.

Goodrich & Clarkson, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. It was error to admit in evidence the declarations made by Homer Smith. These declarations were not called for by the defendant in cross examining the witness who testified to them. They were hearsay, and very damaging to the defendant. They were not admissible evidence against the defendant for any purpose.

The court in its charge directed the jury "to find the defendant guilty if he and Homer Smith were acting together fraudulently, and the horses were taken by either of them." This paragraph

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of the charge was excepted to, and the exception is, we think, well taken. It should have explained that, to constitute the defendant a principal in the theft, he must have taken the horses himself, or must have acted together with Homer Smith in committing the theft, knowing at the time the fraudulent intent of said Smith, and, if not present with Smith at the time of the commission of the theft by said Smith, must have been acting with him at the very time of the commission of said theft in pursuance of a common design existing between them to commit the theft. (Smith v. The State, 21 Texas Ct. App., 122; Cook v. The State, 14 Texas Ct. App., 96; Bean v. The State, 17 Texas Ct. App., 61.)

The above mentioned are the only material errors disclosed by the record. The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered December 14, 1887.

No. 2761.

W. E. WILLIS v. THE STATE.

THEFT—PRACTICE—OWNERSHIP—EVIDENCE—CHARGE OF THE COURT.—

It devolves upon the State, in a prosecution for theft, to prove the name of the owner of the alleged stolen property as it is alleged in the indictment. The given name may be alleged by initials; and, though a variance between the middle initial as alleged and as proved will be immaterial, a variance as to the first initial letter of the given name will be fatal, unless it be proved that the owner was known as well by the name alleged as by the name proved. The indictment alleged the name of the owner in this case to be N. J. S., and the proof showed the name to be M. J. S. The trial court charged, in substance, that if the jury believed M. J. S. to be the person named in the indictment as N. J. S., the proof of ownership would be sufficient. *Held, erroneous.*

APPEAL from the District Court of Knox. Tried below before the Hon. J. V. Cockrell.

The opinion states the case. The penalty assessed was a term of seven years in the penitentiary.

Opinion of the court.

No brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This conviction is for the theft of a horse alleged in the indictment to be the property of N. J. Smith. There is no statement of facts in the record that can be considered. There is what purports to be a statement of facts in the transcript, but it was filed after the adjournment of the court for the term, and there is no order of the court in the record authorizing such filing.

There is a bill of exception in the record, however, which shows that on the trial of the cause the evidence as to the ownership of the horse was that it was the property of M. J. and not N. J. Smith. M. J. Smith testified that she was the owner of the horse, and that her name was Martha Jane Smith, and not N. J. Smith.

Upon the issue of ownership the court charged the jury as follows: "If the jury believe from the evidence that the witness M. J. Smith is the identical person named in the indictment as the owner of the property under the name of N. J. Smith, it would be sufficient proof to support the allegation of ownership as alleged in the indictment; and unless the jury so believe from the evidence, they will find the defendant not guilty." This charge is manifestly erroneous.

The name of the owner of the property must be proved as alleged. The given name may be stated by its initials, and a variance between the middle initial letter as alleged and as proved will be immaterial, but if the variance be as to the first initial letter of the given name it will be fatal, unless the proof shows that the owner was known as well by the name alleged as by the name proved. (Willson's Texas Crim. Laws, sec. 1259.) A special charge was requested by counsel for the defendant which stated the law with reference to the allegation of ownership, as applicable to the evidence, correctly, but the court refused to give it. Notwithstanding the absence of a statement of facts, the error of the charge we have mentioned is apparent, and would be error upon any state of facts.

Because of said error, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered December 14, 1887.

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No. 2595.

WILLIAM WHITFORD v. THE STATE.

FORMER CONVICTION—"CARVING OFFENSES."—CONSPIRACY TO COMMIT BURGLARY is a distinct offense created by the statutes of this State, and it is complete when two or more persons have positively agreed between themselves to commit burglary, though the burglary be never committed. If a burglary and a conspiracy to commit burglary involve the same transaction, the two offenses of burglary and conspiracy to commit burglary may be carved out of the same transaction, and a conviction for the one will not bar a prosecution for the other. See the opinion in *extenso* for an exhaustive discussion of the doctrine.

APPEAL from the District Court of Bexar. Tried below before the Hon. G. H. Noonan.

The indictment in this case jointly charged the appellant and William Neiderluck alias William Miller, Edward Levi and Frank Hawkins, with the offense of conspiracy to commit the burglary of the eating house or restaurant of one Tom Wing, in Bexar county, Texas, on the night of the third day of July, 1886. The separate trial of the appellant resulted in his conviction, and his punishment was assessed at a term of four years in the penitentiary.

Beginning on page 38 of the twenty-third volume of these Reports, will be found the report of the case of Neiderluck alias Miller v. The State, which was an appeal from a conviction for the burglary of the restaurant of Tom Wing, that transaction being the same out of which this prosecution was carved. A full statement of the evidence adduced upon the trial of the said Neiderluck is set out in that report. The evidence adduced upon this trial, so far as it relates to the burglary, is identically the same as that elicited upon the said trial of Neiderluck. This report will, therefore, embrace only such evidence as was delivered upon this trial and was not upon the trial of Neiderluck. Such additional evidence comprises the testimony of the conspirator Levi, who appeared as a witness for the State, and testified directly to the acts of conspiracy.

He testified that his name was Edgar Levi, but that he was the person described in the indictment as Edward Levi. He was

Statement of the case.

employed as a hand in the restaurant of Tom Wing at the time alleged in the indictment, and had then been in Wing's service about three weeks. He then knew the defendant and had known him about three years. He formed Neiderluck's (or Miller as he was known) acquaintance a day or two before the date alleged in the indictment. Four or five days before the date of the alleged offense, the witness met the defendant on the Military Plaza, in San Antonio, and, after some talk, asked him if he "wanted to turn a trick." Defendant replied that he was "strapped," needed money, and was ready for anything. Witness then told him that Tom Wing, the Chinaman for whom he was working, had a trunk in the restaurant which contained between three and five thousand dollars, and that the trick he referred to was to get that money. Witness explained to defendant the position of the trunk in the house, and told him that he (witness) slept on the gallery. Defendant agreed to help the witness get the money, and witness suggested to him to do the work that night. The defendant replied that it could not be done that night, as he would have to get a gun, and somebody else to help him. Witness replied that a gun was not needed, as he had chloroform which, however, he did not know how to use. Defendant then said that he would get some one to assist who understood the use of chloroform, but that he would also get a gun to use in case of interference.

Witness next met defendant on the Houston street bridge, near the restaurant, where he and Neiderluck or Miller were taking a view of the restaurant and its surroundings. Witness suggested to them to go into the restaurant and take dinner, so that they might get a correct idea of the interior arrangement of the establishment. Defendant went in and got dinner, and, after he had eaten, witness took him into the Chinaman's room and showed him the trunk and the interior arrangements of that room. About nine o'clock, on the night of July 3, 1886, the witness, defendant, Neiderluck and Charley Hyatt met by appointment, near an old blacksmith shop, at the corner of Acequia street. None of the parties then knew or suspected that Hyatt was "standing in" with the officers. It was agreed that witness and Hyatt, who was also an employe of Wing, would return to the restaurant and await the arrival of defendant and Neiderluck. Hyatt pretended to want to do the work at once, but defendant and Neiderluck insisted that they must procure weapons to resist any possible attempt to arrest them if discovered.

Opinion of the court.

Neiderluck claimed to know how to use chloroform, and it was agreed that he should use it. Witness told defendant and Neiderluck that Wing did not always lock the front door, but sometimes closed it and braced it with a chair, and that when so closed it was easily opened. It was agreed that defendant and Neiderluck should first try the front door, and if they failed to get in they were to come to the back gallery, on which witness and Hyatt had their beds, and they (witness and Hyatt) were to admit them through the back door. The agreement further provided that the four parties named were to go into Wing's room together, chloroform Wing, rob the trunk, and then take the money to a point near the railroad and divide it equally. Witness and Hyatt went to bed on the back gallery, as agreed, and, at about two o'clock on that morning, defendant and Neiderluck came to the said back gallery. Witness and Hyatt got up, and witness led the party into the restaurant through the back door, which he had left open. Witness and Neiderluck each had a pocket handkerchief saturated with chloroform. Neiderluck became afraid to use his handkerchief, and witness then spread the one he had over Tom Wing's face. About this time defendant and Neiderluck started towards the dining room, and witness, hearing somebody step on the gallery, became alarmed and started to run, but ran into the clutches of Policeman Fitzhenry. Wing, though frightened and dazed on being aroused, managed to get a light, and the officers, placing the witness in front of them, marched into the room where defendant and Neiderluck then were. Witness, as he passed through the door, called to defendant and Neiderluck: "Boys, don't shoot; they have got me in front, and you will hurt me." Witness conceived the idea of getting the Chinaman's money as soon as he ascertained that he had it. He had tried, but failed, to get others to join him in the robbery before he proposed it to defendant.

Gerald Griffin, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. Whitford, Neiderluck alias Miller, Edward Levi and Frank Hawkins were jointly indicted for conspiracy to commit burglary. Appellant Whitford was tried alone, a severance being had, was convicted and appeals to this court. In bar to this prosecution appellant interposed a plea of conviction

Opinion of the court.

for the burglary. Upon motion of the district attorney this plea was stricken out, and appellant excepted.

Was the plea a bar, conceding it to be true, to the prosecution for conspiracy? Appellant was convicted of the substantive offense, to wit, burglary as a principal, not as an accomplice. Being placed on trial for conspiracy to commit the same burglary, will the conviction of the burglary as a principal bar the prosecution for the conspiracy? We have examined all the authorities accessible to us at this place, but have failed to find in any work the precise question presented or discussed.

The doctrine of merger does not solve the question, but the doctrine of "carving" does to some extent aid in its solution. Says Mr. Bishop: "There is a difference between a crime and a criminal transaction. A criminal transaction may be defined to be an act or series of acts proceeding from one wrongful impulse of the will of such a nature that one or more of them will be indictable. * * * In reason there may be any number of distinct crimes in a single criminal transaction. This comes from the fact that the words of our language being limited, while the transactions of life may almost be termed infinite in variety, and the lines to be drawn around specific offenses being necessarily incomparably more limited than the words, it is impossible there should be an exact outline of crime whose circumference shall exactly coincide with every criminal transaction. The consequence is that the law does, what it must, declare this combination a fact and intent to be indictable, then another combination, and another, and so on, until it is supposed to have proceeded far enough, when it stops. And when this is done, it is impossible the inhibitions should be so distinct that no one shall embrace anything forbidden by another. Therefore it is established doctrine that more than one offense may be committed by a man in one transaction. Whether a prosecution for one crime carved out of the one transaction should be held to bar an indictment for another crime carved out of the same transaction is a different question; but the authorities appear to be that in some circumstances it will be, and in others it will not."

Now, in harmony with these principles our code has carved two offenses from this one criminal transaction. It has declared that the offense of conspiracy is complete if two or more persons positively agree between themselves to commit burglary,

Opinion of the court.

though the burglary is not committed. (Penal Code, arts. 800, 801, 802, 804.)

Under what circumstances will a conviction for one cause carved out of one transaction bar an indictment for another, when carved out of the same criminal transaction? Now, if A steals a horse and saddle at the same time, a conviction for the one bars a prosecution for the other. This is well settled and plain sailing. But suppose A, B and C, conspire to steal three horses from the same stable and ride them out of the city, and with a view of carrying out this criminal transaction they steal three saddles the night before the theft of the horses, certainly a conviction for the theft of the horses would not bar an indictment for the theft of the saddles; and this would be so, though the theft of the saddles was a part of the same criminal transaction.

On the other hand let us submit an illustration. Suppose appellant had been convicted of the burglary as an accomplice, by proof of the very facts which make up the conspiracy, would such a conviction bar an indictment for the burglary? An accomplice is one who agrees with the principal offender to aid him in committing the offense, though he may not have given him such aid.

A, B and C enter into a positive agreement to aid one another in murdering E. A commits the murder; B and C are accomplices, the fact that the agreement was positive, and that each would aid in the commission of the offense would not alter the case; all not present would be accomplices. But to convict B and C as accomplices, the State would have to rely upon the facts constituting the conspiracy. This would be so in the supposed case, but not in all cases by any means, for quite a number of acts may constitute the actor an accomplice which would not technically constitute "a conspiracy." We would hold that, in the supposed case, a conviction for the substantive offense as an accomplice would bar an indictment for the conspiracy. Upon what principle? Obviously upon the principle that a party can not be constitutionally convicted twice for the same acts and intent.

The case in hand does not occupy this attitude. Appellant was convicted of the burglary as a principal offender, and while the conspiracy may have been adduced in evidence in order to establish the burglary, and in connection with other facts to prove the guilt of appellant as a principal, yet this would not be a conviction upon the acts constituting the conspiracy. For

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upon trial for an offense, evidences of other offenses is very frequently and justly received, and because proof of other offenses has been drawn upon to aid in convicting of a certain crime, this fact does not bar a prosecution for the other offenses.

We are of opinion that under the facts of this case, to wit, that appellant was convicted as principal for the burglary, that there was no error in sustaining the district attorney's motion to strike out the plea. The indictment is good and not subject to the objection that it is duplicitous.

We find no error in the judgment, and it is affirmed.

Affirmed.

Opinion delivered December 14, 1887.

No. 2620.**BEN PRESLEY v. THE STATE.**

FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY—INDICTMENT—FACT CASE.—The indictment in this case alleges that the mortgaged property was fraudulently disposed of by the accused to some person to the grand jury unknown. The evidence shows that it was disposed of to one Ike Thomas, and that the grand jury either knew, or by the exercise of reasonable diligence could have ascertained, that fact. *Held*, that the indictment is sufficient to charge the offense of fraudulently disposing of mortgaged property, but the evidence disproving an essential allegation in the said indictment, is insufficient to support the conviction.

APPEAL from the District Court of Freestone. Tried below before the Hon. Sam R. Frost.

The conviction in this case was for fraudulently disposing of a horse on which the accused had previously executed a chattel mortgage, and the penalty assessed was a term of three years in the penitentiary.

The testimony of the prosecuting witness shows that when he reported this cause to the grand jury he knew that Ike Thomas was the person to whom defendant had traded the horse, and that said Thomas at that time was living in Freestone county.

Syllabus.

Kirven, Gardner & Etheredge, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This conviction was for fraudulently selling, trading and disposing of certain mortgaged property. It is alleged in the indictment that the property was sold, traded and disposed of to a certain person whose name is to the grand jurors unknown. Upon the trial it was shown that the property—a horse—was traded to one Ike Thomas, and this fact was evidently known to the grand jury, or could have been known by the smallest degree of diligence.

If the name of the person to whom the property was sold or traded was known to the grand jury, it was essential that it should have been given in the indictment. The Assistant Attorney General contends that, since the question is the intent to defraud, it matters not to whom the property was sold or traded. While this is true, the indictment should nevertheless inform the accused of the name of the person to whom the property was sold or traded. (*Bush v. The State*, 1 Texas, 455; *Bunch v. The State*, 1 Texas, 609; *Schwartz v. The State*, 25 Texas, 764.)

The indictment in this case is sufficient; but the proof fails to sustain the allegation that the name of the person to whom the property was sold or traded was unknown to the grand jury. As above stated, the proof shows beyond doubt that the horse was traded to Ike Thomas, which fact could have been ascertained by the use of any diligence whatever.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered December 14, 1887.

No. 2754

W. R. ORMAN v. THE STATE.

1. MURDER—SELF DEFENSE—CHARGE OF THE COURT—CASES APPROVED.—

In regulating the right to take life in necessary self defense, the code of this State establishes an essential distinction, based upon the nature

94	496
98	215
28	430
99	230
99	367
94	495
30	686

Syllabus.

and severity of the unlawful attack, and discriminates it into two classes. The first class, regulated by article 570 of the Penal Code, comprises all cases in which, from the acts of the assailant or his words coupled therewith, it is reasonably apparent that his intent is to murder or do serious bodily harm, in which case the assailed party may lawfully slay his aggressor while he is committing the offense, or when he has done some act evidently showing his intention to commit it. The second class, regulated by article 572 of the Penal Code, comprises those cases in which the purpose or intent reasonably indicated by the unlawful and violent attack is other than those above mentioned. The proof on this, as on the former trial of this case, shows that, if the deceased made any attack on the accused, it was a murderous attack which came clearly within the provisions of article 570 of the Penal Code, and there was no evidence whatever tending to show a milder attack. In this state of the proof, the trial court erred in charging the provisions of article 572, because such charge, being unauthorized by the proof, was calculated to confuse and mislead the jury. Note the opinion for the approval on the subject of Orman's case, 22 Texas Court of Appeals, 604, and Kendall's case, 8 Texas Court of Appeals, 569.

2. **SAME—MANSLAUGHTER—"ADEQUATE CAUSE."**—Any condition or circumstance which is capable of creating sudden passion, rendering the mind incapable of cool reflection, may be "adequate cause," and where the evidence shows a number of conditions or circumstances tending either singly or collectively to show "adequate cause," the jury should not be restricted by the charge to a consideration of a single condition or circumstance, but should be directed to consider them all in determining the question of "adequate cause." The proof in this case shows (besides insulting language used by the deceased about the mother and sister of the defendant) that the deceased, for several hours preceding the killing, was searching for the defendant with the avowed intention of killing him on sight, and that he was armed with a pistol with which he declared his intention to kill the defendant. *Held:* That, in confining the "adequate cause" to the insulting language, and in failing to submit to the jury whether the said acts and threats of the deceased (which were proved to have been communicated to the defendant), of themselves, or in connection with the insulting language, were not "adequate cause," the charge of the court on the issue of manslaughter was erroneous.
3. **SAME—"COOLING TIME."**—See the statement of the case for a charge of the court on the principle of "cooling time," *held*, erroneous because not authorized by the proof.
4. **SAME—EVIDENCE—PRIVILEGED COMMUNICATIONS.**—See the statement of the case in *Orman v. The State*, 22 Texas Court of Appeals, 604, for the evidence of an attorney at law, *held* not to partake of the nature of a "privileged communication," and to have been properly admitted.
5. **JURY LAW—NEW TRIAL—PRIVILEGE OF COUNSEL.**—The proof in support of the motion for new trial, based upon the misconduct of a juror, failing to show any prejudice to the rights of the accused, the trial court did not abuse its discretion by refusing the new trial. Note the animadversion of this court upon the reprehensible conduct of a press reporter

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in eavesdropping the jury while considering their verdict. Note also this court's disapproval of the language used by the prosecuting counsel in the closing argument for the State.

APPEAL from the District Court of McLennan. Tried below before the Hon. John N. Henderson, on exchange.

This is the appellant's second appeal from convictions in the second degree for the murder of W. F. Hughston, in McLennan county, Texas, on the seventh day of September, 1885. The penalty assessed in the present conviction was a term of five years in the penitentiary. The conviction in this case was had upon substantially the same evidence that was adduced upon the former trial, which will be found fully reported in the twenty-second volume of these Reports, beginning on page 604. As important, however, to elucidate the ruling of this court upon the action of the trial court in overruling the motion for new trial, it is deemed proper to set out, in this report, the affidavit of M. B. Davis, filed, and the testimony of the said Davis adduced to controvert the defendant's affidavit in support of the said motion. Among the grounds alleged for new trial, the motion sets up the following:

"Second. Defendant submits that he has not had a fair and impartial trial, for the following reason, to wit: The charge of the court was given to the jury, and they retired to consider of their verdict about half past twelve o'clock p. m., on Friday, the eighteenth day of November, and their verdict was returned into open court at about eleven o'clock on Saturday morning, the nineteenth day of November. On Friday, November 18, a 'special dispatch,' dated Waco, Texas, November 18, was sent to the Dallas Morning News, and published in the daily of November 19, some six or seven hours before the verdict of the jury was returned on said November 19, as aforesaid; wherein, among other things, occurs the following: 'The jury in the case of The State of Texas v. W. R. Orman, charged with the killing of W. F. Hughston, after fourteen hours, brought in a verdict of guilty, assessing punishment at confinement in the penitentiary for five years. At the March term, in 1886, Orman got fourteen years. This was reversed and remanded, and this is his second trial.' Defendant submits to the court that this shows communication between the jury in his case, or some of them, and outsiders, contrary to law, public policy and the rights of defendant."

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The counter affidavit of M. B. Davis reads as follows: "I, M. B. Davis, do solemnly swear that I am the correspondent of the Dallas News in Waco, and I am the person who sent to the said News the item referred to in the motion for new trial of defendant W. R. Orman, which was published in said News before the verdict was rendered in open court; and I do solemnly swear that I did not communicate with any member of the jury in reference to the case on trial or anything else, and that I did not get the information sent by me to the News from anyone else who had communicated with the jury. I formed my opinion of what the verdict of the jury would be from words I heard spoken through the walls of the jury room while I was standing on the steps leading down from the district court room to the lower story of the court house, and from a general discussion I could hear from the outside going on in the jury room. When I sent the dispatch I did not, as a matter of fact, know what the verdict of the jury would be, and when it was rendered it happened to be just what I had stated it to be in the dispatch. In other words, I made a good guess at the verdict, based upon the facts acquired by me as stated above. I will further state that the copy of the News in which said dispatch was published did not reach Waco until after the verdict was rendered by the jury, and consequently could not have been seen by any member of the jury during their deliberations on the case."

The substance of the testimony of the said M. B. Davis, adduced upon the hearing of the motion for new trial, was that he sent the dispatch recited in the motion to the Dallas News and the Galveston News, at about eleven o'clock on the night before the verdict was actually returned into court. He obtained the facts upon which he based the said dispatch in this wise: He took his seat on the steps leading from the second to the first floor of the court house, at a point near the wall of the jury room, in which the jury were then deliberating on the case. Part of the time he sat there he had his head against the wall of the said jury room, and part of the time he held his ear to the key hole of the jury room door. While thus situated he heard the jurors confusedly discussing the case, using the terms "manslaughter," "ninety-nine years," "ten years," and "five years." From the fact that a larger number of the voices appeared to favor five years, the witness reached the conclusion, as a mere conjecture, that the penalty of five years would be assessed against the defendant, and accordingly sent the dispatch set out

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in the motion. He had no communication with any member of the said jury. The issue of the Dallas News containing the said dispatch did not reach Waco until two hours after the verdict was actually rendered in open court, and the jury was discharged.

The charge of the court on the subject of "cooling time," referred to in the third head note of this report, reads as follows: "As to 'cooling time,' the court charges you that it is time for passion to subside and reason to interpose after provocation. What is 'cooling time' is a question for the jury under the facts and circumstances of each particular case."

The language used in the closing argument for the State, referred to in the last head note of this report, was as follows:

"The defendant, Bud Orman, armed himself and hunted the deceased, Bud Hughston, and shot him like a dog, and then gave up his pistol and surrendered to an officer, and said, 'Herring advised me to kill him, and Herring said he would clear me.' Yes, gentlemen of the jury, I have seen several men that Herring defended and said he would clear hung as high as Haman."

George Clark and Herring & Kelley, for the appellant: 1. The court erred in requiring M. D. Herring, counsel for appellant, while engaged in the trial, to detail, as a witness, the private professional conversation between himself and appellant before the killing.

Upon this trial, when the State proposed to prove by the witness the confidential and professional interview between himself, as counsel, and defendant, the jury were withdrawn, and the court, after hearing the evidence, decided that it should go to the jury. This examination by the court showed that Herring could not, in any manner whatever, be connected with the killing as even quasi particeps criminis (but on the contrary as advising against it.) The evidence ought to have been excluded, as it is only upon the particeps criminis theory that the evidence was admissible. Upon the former trial, it was developed while the witness was giving his evidence to the jury, that he had a conversation with appellant about the killing before it occurred, and hence the court (not being called upon to have the jury withdrawn) could not do otherwise than let all the evidence be heard.

Herring's evidence was very damaging to appellant, as it was used by the State to show deliberation on the part of appellant.

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Appellant sought a private interview with Herring in his office, told him the remarks deceased had made about appellant's mother and sister (saying they were whores and had made all the money he had by cohabiting with negroes) and asked Herring what would be the consequences if he killed deceased. Herring read him the statute in case of killing for insulting words used concerning female relatives, and advised him to have no trouble with Hughston.

2. The court erred in refusing to grant a new trial, when it was discovered after the trial that the juror McCrary was not a fair and impartial juror, but was prejudiced against appellant.

The trial commenced on Wednesday, and it was shown by evidence upon the motion for a new trial that, on Monday before the trial commenced, McCrary was a regular juror for that week, and while on his way to the court house he fell in conversation with Clinton and Harris, and was asked what he thought of the Orman trial, which was coming up during the week, and he replied that he did not believe in a man being shot down like a damned dog without giving him any showing for his life, and that if he was on the jury he would hang Orman. Whereupon one of the party, Clinton, said to him that he need not go to the court house, if he entertained such expressed views; that they would not take him as a juror in the case; and he said: "Well, if they take me, by God I will hang him."

The juror himself confessed to having made the statements, but claimed to be unbiased, and thought himself to be a fair juror.

Counsel asked him: "Mr. McCrary, it is true, is it not, from the general talk in the community about the Orman case, and from what you had read of the evidence in the newspapers, that you had formed a conviction in your mind that Orman had waylaid Hughston and shot him without giving him a showing, and did you not so think at the time you were sworn in as a juror in this case?" and he said: "Yes, I thought it was a pretty bold thing for a man to do."

The juror furthermore admitted that he remembered of counsel for appellant having asked questions of the jury while it was being impaneled, but said he did not remember of being asked if he had expressed an opinion as to appellant's guilt.

This juror was shown to be an honest, reliable, truthful man, and of strong, earnest and steadfast convictions and stubborn in his notions and tenacious in his opinions, and, while he was

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shown to be a jocular man, he did not so impress Clinton and Harris, to whom he was talking when he made the statement that he would hang Orman if he was taken on the jury. He appeared to them to be in earnest, and to mean what he said.

We submit to the court that the conviction, on account of McCrary's disqualification, ought not to be allowed to stand, even if no other error had been committed upon the trial. The statements of the juror were not known to appellant or his counsel until after the trial. (*Hanks v. The State*, 21 Texas, 526; *Henrie v. The State*, 41 Texas, 579; *Sewell v. The State*, 15 Texas Ct. App., 623; *Cody's case*, 3 How., 27; 2 Ga., 480; *Whart. Am. C. L.*, 1022; 7 Cowan, 128; 13 S. & M., 189; 19 Ohio, 198; 1 Lee, Va., 598; 9 Dana, 203.)

3. The court erred in charging the jury that before appellant would be justified in killing deceased in defense of an attack being made on him by deceased, which produced in appellant's mind a reasonable expectation or fear of death or serious bodily injury, that appellant must have resorted to all other means to prevent the injury before the killing, except retreating; and that appellant could not claim the protection of the right of self defense unless he brought himself within this restriction. This idea is set forth twice in the charge.

Such is not the law of this case. The charge was excepted to by appellant at the trial, and a counter charge requested to the effect that appellant was not required to resort to all other means to prevent the injury before killing, except to retreat, if he was attacked by deceased in such a way as to produce in his mind a reasonable expectation of death, etc. (*Hunnicut v. The State*, 20 Texas Ct. App., 643.)

4. The court erred in charging the jury that "homicide is justifiable in the protection of the person against any other unlawful and violent attack besides an attack with murderous intent, but in such place the killing must take place while the person killed is in the very act of making the unlawful attack, and in such case all other means must be resorted to for the prevention of the injury before the party would be justified in killing, except retreating. Appellant excepted to this charge."

On the former appeal of this case this court held that the reverse of the above instructions as to resorting to other means ought to have been given in charge to the jury. (22 Texas Ct. App., 621.)

5. The court erred in charging that before the killing could

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be reduced to the grade of manslaughter (where the killing results from insults to female relations, etc.) * * * * * the jury must believe that appellant was laboring under a degree of anger, rage, resentment or terror such as would commonly in a person of ordinary temper render the mind incapable of cool reflection.

Appellant was entitled under the statute to the benefit of a charge reducing the killing to manslaughter, if the jury believed the killing occurred at the first meeting after the insulting words had been communicated to appellant, and the jury ought not to have been restricted to a belief that he must have been incapable of cool reflection in order to reduce the offense to manslaughter. If the killing was by reason of passion produced by the insult, the offense would be reduced to manslaughter, and appellant was entitled to have the law thus given to the jury unencumbered with a cool reflection clause. (Penal Code, art. 598.)

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This cause was before us, upon a former appeal, upon substantially the same facts and charge of the trial court, and the judgment of conviction was reversed and the cause remanded for another trial, because of an error in the charge upon the issue of self defense. (*Orman v. The State*, 22 Texas Ct. App., 604.) We held, on the former appeal, that it was error to charge with respect to the character of self-defense defined in article 572 of the Penal Code, because the facts of the case did not demand and warrant such a charge, for the reason that, if deceased made an attack upon the person of the defendant, it was a murderous attack coming clearly within the provisions of article 570 of the Penal Code, and hence that article alone was applicable to the evidence.

Upon the issue of self defense, the evidence in the record now before us is in no material particular different from that which was before us on the first appeal, and yet the learned trial judge gave in charge to the jury the substance of article 572, which portion of his charge was promptly excepted to by the defendant. We still entertain the opinion that such charge was inapplicable to the facts of this case, calculated to confuse and mislead the jury, and injuriously to affect the defendant's rights. As made by the evidence, the issue of self defense was governed by the provisions of article 570 alone, and article 572 should not have

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been given in charge. (*Kendall v. The State*, 8 Texas Ct. App., 569.) In the case just cited, it is said: "If the attack of the person slain was manifestly with the intent to murder or maim—that is, made with weapons or other means calculated to produce either of those results—then there is no occasion to instruct a jury as to the law which obtains in case the attack was of a milder character, because such law is not applicable to the case, and can subserve no purpose other than to confuse the jury." It is manifest, from the evidence in this case, that if the deceased, at the time he was shot by the defendant, was making any attack upon the defendant, it was an attack with a deadly weapon, and made with the intent to kill the defendant or inflict upon him serious bodily harm. There is no evidence even tending to show an attack of a milder character.

As a part of the law of self defense, the charge of the court with reference to threats made by deceased against the defendant is complained of by defendant, and upon this subject a special instruction was requested by counsel for the defendant, and was refused by the court. After a careful examination of this portion of the court's charge, we are of the opinion that it is full, fair and correct, applicable and pertinent to the evidence, not only embodying the law as expressed in the refused special instruction, but more favorably to the defendant than in said special instruction.

Serious objections are urged by counsel for the defendant to the court's charge upon the issue of manslaughter. Except in two particulars, we are of the opinion that the charge upon manslaughter is not materially erroneous. It restricts the "adequate cause" to the insulting language used by deceased about the mother and sister of the defendant. This, we think, was error. It was in evidence that the deceased, for several hours immediately preceeding the killing, was searching for the defendant with the avowed purpose of killing him on sight, and was armed with a pistol, with which he stated he intended to kill the defendant. Defendant had been informed of the threats and conduct of the deceased just prior to the killing. It should have been submitted to the jury whether these facts alone did not constitute "adequate cause," or, if not, whether in connection with the insulting language used by deceased about defendant's mother and sister, there was not "adequate cause." Any condition or circumstance which is capable of creating sudden passion, rendering the mind incapable of cool reflection, may be

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"adequate cause," and where the evidence shows a number of conditions or circumstances tending either singly or collectively to show "adequate cause," the jury should not be restricted by the charge to a consideration of a single condition or circumstance, but should be directed to consider them all in determining the question of "adequate cause." (Williams v. The State, 15 Texas Ct. App., 617; Neyland v. The State, 13 Texas Ct. App., 536; Miles v. The State, 18 Texas Ct. App., 156; Howard v. The State, 23 Texas Ct. App., 265.)

The other error in the charge on manslaughter is that portion of said charge which instructs the jury as to cooling time. That portion of the charge was, we think, inapplicable to the facts, and not the law of the case. In other respects, we are not prepared to say that the charge upon manslaughter, or upon any other issue in the case, is erroneous. But, for the errors we have mentioned, the conviction must be set aside.

With respect to the testimony of the witness Herring, we held on the former appeal that it was not privileged and was properly admitted, and we adhere to that view.

We do not think the court abused its discretion in refusing to grant defendant's motion for a new trial upon the grounds of the disqualification of the juror McCrary, and the alleged misconduct of the jury. It satisfactorily appears that the defendant was not injured in his rights by reason of said juror having passed upon the case, and that Davis, the newspaper reporter, did not, by any misconduct of the jury, obtain information about the verdict, but that he obtained all the information he had in regard to the verdict by the low and disreputable method of eavesdropping, and reported the verdict to the newspaper he represented, without knowing whether his report was true or false. This indefensible conduct of the reporter Davis was a flagrant contempt of the court, and a most reprehensible invasion of the precincts of justice, which should have been, if it was not, promptly and severely punished by the trial court.

The remarks of counsel for the prosecution in his closing address to the jury, and which are presented in the record by a bill of exception, were certainly unwarranted by any evidence in the case, and were discourteous to opposing counsel. The learned trial judge properly and promptly reprehended the counsel for making the remarks, and instructed the jury to disregard them. We will express no opinion as to what would be our disposition

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of this case were these improper remarks the only error disclosed by the record.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered December 16, 1887.

No. 2759.

B. A. HIGGENBOTHAM v. THE STATE.

24	505
36	124
36	128

PERJURY—EVIDENCE—CHARGE OF THE COURT.—It was not error to permit the State in a trial for perjury, to read in evidence the complaint filed in the cause upon the trial of which the perjury was alleged to have been committed, inasmuch as such evidence was competent to prove that the alleged false statements were made in the judicial proceeding and before the court alleged in the indictment, but, having admitted such evidence, the trial court, in its charge, should have limited its effect to such purpose only.

APPEAL from the District Court of Rains. Tried below before H. W. Martin, Esq., Special Judge.

The conviction was for perjury, and the penalty assessed was a term of five years in the penitentiary.

The State first introduced in evidence the complaint by which the offense of forgery was charged against one Joe Bryant, in that the said Bryant, having received from one Belcher an order on one Cain for one dollar's worth of goods, erased the word "one" in said order and substituted the word "two."

By agreement of the parties the State next read in evidence the written testimony of A. T. Dykes, taken upon the examining trial of Joe Bryant. The substance of that testimony was that, on the twenty-fifth day of July, 1885, the witness gave to the said Bryant an order on T. M. Cain for one dollar's worth of goods, drawn by B. A. Belcher, in favor of bearer, which order the witness obtained from one Rounsaville. Witness next saw that order in the possession of T. M. Cain. The word "one" before the word "dollars" had been erased, and the word "two" substituted in its place. So far as the witness knew, no one but John Eaton was present when witness gave the said order to the

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said Bryant. If B. A. Higgenbotham was ever at the witness's house, the witness did not know it.

John Eaton testified, for the State, in substance that he was at Dykes's house on one occasion in July, 1885, when Joe Bryant came to that house and had a settlement with Dykes. In that settlement Dykes gave Bryant fifty cents in money and an order on T. M. Cain for one dollar's worth of goods. No one was present at that time but Bryant, Dykes and witness, Mrs. Dykes and Mrs. Griffin having shortly before gone to Joe Bryant's house. Defendant at that time lived in Upshur county, and if he was then in Rains county the witness did not know it. Witness did not read the order, and could not say of his own knowledge that it called for but one dollar's worth of goods, but its face value was so stated by the parties to the transaction, although Bryant said that its real value was but seventy-five cents.

The State next introduced in evidence the written testimony of the defendant taken upon the examining trial of J. W. Bryant. It reads as follows: "I live in Upshur county. I was in Rains county about July 25, 1885, and went with defendant, Joe Bryant, to the residence of H. T. Dykes, and said Dykes give to Joe Bryant an order signed by B. A. Belcher to T. M. Cain for two dollars in goods. I am certain this is the order, because Joe Bryant owed me, and I offered him two dollars for it after reading it. I was here for one day only, and let myself be seen as little as possible while here, being on strictly private business. Cross examined: I went with Joe Bryant to Mr. Dykes's house. We went in the house. Did not see any one there except Mr. Dykes. Dykes gave Bryant the order then. Then we went back to Bryant's.

B. A. HIGGENBOTHAM."

County Attorney Brock was next placed upon the stand by the State, and identified the written instrument just read in evidence as the written testimony of the defendant, taken upon the examining trial of J. W. Bryant. He knew as a fact that the oath was administered to the defendant before he delivered that testimony, and that the defendant, after it was reduced to writing, signed it.

W. P. Harrison testified, for the State, that if defendant was in Rains county in July, 1885, he, witness, did not know it. Witness, in July, 1885, owned the order in evidence. It then called for one dollar's worth of goods from Cain's store, and was

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written by B. A. Belcher in the witness's presence. Witness let Bob Rounsaville have the said order. He next saw the said order on the examining trial of Joe Bryant for raising said order from one to two dollars. He heard the defendant testify, on that trial, that he saw Dykes give the said order to Bryant, and that it then called for two dollars worth of goods.

The State rested.

J. W. Bryant testified, for the defense, that in July, 1885, he went to the house of H. T. Dykes, in Rains county, and obtained from the said Dykes an order on Cain's store for one dollar's worth of goods, which order was signed by H. T. Dykes. John Eaton was the only other person present at the time. On a subsequent occasion in said July, witness, in company with the defendant, went to the house of the said Dykes, and Dykes gave witness another order on Cain's store for goods. That order was signed by B. A. Belcher, and called for two dollars worth of goods. Defendant, witness and Dykes were the only persons present on that occasion. Witness was the man who was charged before Justice of the Peace Lamb with the forgery of the two dollar order. He made no voluntary statement on his examining trial, nor did he then question Dykes about the one dollar order signed by him, Dykes. That one dollar order was not honored at Cain's store, and Dykes went with witness to Zuckerman's store, where it was paid. Neither Mrs. Dykes nor Mrs. Griffin were at his house in July, 1885.

Mrs. Joe Bryant testified, for the defense, that the defendant came to her house late one evening in July, 1885, and went with Joe Bryant towards Dykes's house, to which house Bryant said that he was going. Witness did not know, except from what the parties said after their return, that they went to Dykes's house. She did not testify on her husband's examining trial, when he was charged with the forgery of this order. Witness had no recollection of a visit paid to her house in July, 1885, by either Mrs. Dykes or Mrs. Griffin.

The defense closed.

Mrs. Griffin testified, for the State, in rebuttal, that late one evening in July, 1885, she and Mrs. Dykes went from Dykes's house to that of Joe Bryant. Upon their arrival, Joe Bryant said that he was going to Dykes's house to see Dykes, and he went off in that direction. On her return to Dykes's house, on that night, the witness heard Mr. Dykes say that he gave Joe Bryant an order on Cain's store, signed by B. A. Belcher.

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The motion for new trial raised the questions discussed in the opinion.

No brief for the appellants.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This appeal is from a conviction for perjury alleged to have been committed by the defendant when testifying as a witness before an examining court in a cause wherein the State was plaintiff and one J. W. Bryant was defendant, said Bryant being charged with forgery.

On the trial of this cause, the State read in evidence the complaint in writing and under oath, made by one Dykes, charging J. W. Bryant with forgery, and upon which the prosecution against Bryant, in which prosecution the alleged perjury was committed, was founded; and also read in evidence the testimony of said Dykes given on the trial of said complaint and reduced to writing before the examining court.

Having admitted this extraneous evidence for the purpose of proving the alleged false statements made by the defendant in the judicial proceeding, and before the court alleged in the indictment, and to show the issue joined in said proceeding, it was the imperative duty of the court, in its charge to the jury, to instruct that such testimony could not be considered by the jury in determining the main issue—which was the willful and deliberate falsity of defendant's statements—but could only be considered for the specific purposes above named. (*Davidson v. The State*, 22 Texas Ct. App., 372; *Maines v. The State*, 23 Texas Ct. App., 568.) This duty the trial judge failed to perform, and the omission is error for which the conviction must be set aside, and error which the Assistant Attorney General has confessed.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered December 16, 1887.

Opinion of the court.

No. 2640.

A. STOKELY v. THE STATE.

THEFT—FACT CASE.—To constitute theft the taking of the property must have been wrongful, unless the possession of the property was obtained by some false pretext, or the taking was accompanied by the intent to deprive the owner of the value of the property. Conversion by the accused of property lawfully obtained is not sufficient to establish the fraudulent intent at the time of the taking. See the opinion in extenso for the substance of evidence held insufficient to support a conviction for horse theft.

APPEAL from the District Court of Fannin. Tried below before the Hon. D. H. Scott.

The opinion sufficiently discloses the case. The penalty assessed against the appellant was a term of five years in the penitentiary.

Taylor & Galloway and R. B. Semple, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This is a conviction for the theft of a mare, the property of T. J. Savage. These are the facts:

Savage, the owner of the mare, lived in Delta county, about twenty-two miles from Honey Grove; in Fannin county. He left his home in Delta county for Honey Grove, and while on his way and within about one-fourth of a mile of the latter place he dismounted and turned his mare loose, leaving on her his bridle, saddle and overshoes. He then met defendant, who was a stranger to him. Defendant inquired the way to the tie camp, which was across North Sulphur creek. Savage described to him the way, and told defendant that if he was going there that he had turned his mare loose down the road, and that he (defendant) might ride her to the forks of the road (the road forked about ten miles from where the parties were) if he would turn her loose when he got to the forks of the road. To this the defendant agreed, thanking Savage, and started toward the mare, which was about a hundred yards down the road. Ap-

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pellant got the mare, and while on the road to but before he reached the fork, converted her to his own use by swapping her, the saddle, bridle and overshoes to Lee Richards for an overcoat worth nine dollars and eleven dollars in money, telling Richards that his name was Sargent and that he had purchased the mare from a man in the Indian Nation.

Do these facts warrant the verdict? To constitute theft, the taking must be wrongful, unless possession of the property was obtained by some false pretext, or where the taking is accompanied with the intent to deprive the owner of the value of the property. Savage gave defendant permission to take and ride his mare to the forks of the road, there to be turned loose; defendant agreed to turn her loose at that point. In this there was no pretext at all, but simply a promise to turn the mare loose at the fork of the road. The proposition was made by the owner of the mare, and accepted by defendant.

But there must not only be a pretext, but the pretext must be false, and false when made. It is impossible for this to have been such a pretext as is contemplated by the statute, because impossible of proof. Defendant stated nothing relative to a present or past fact, nor the purpose for which he would use the mare, which could be shown by evidence to be false when the statement was made. Hence, what he said was simply a promise, the truth of which when made not being susceptible of proof.

Did he intend to deprive the owner of the mare when he took her? The above observations apply to this question also. However, it may be urged that this intention may be inferred from the conversion. No reliable authority can be found, we venture to assert, to support this proposition. If this be a correct proposition, the first question is not in the case, because the conversion is shown beyond all doubt. Again, the authors who have written at great length upon this subject were engaged in a work quite useless and unnecessary, if the proposition be correct that when possession of property is obtained by the permission of the owner the conversion alone is proof that the taker intended at the time of the taking to deprive the owner of its value.

We are of opinion that the verdict of the jury is not supported by the evidence, and the judgment is hereby reversed and the cause remanded.

Reversed and remanded.

Opinion delivered December 16, 1887.

Opinion of the court.

No. 2609.

CESARIO CORTEZ v. THE STATE.

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THEFT—CONSPIRACY—EVIDENCE.—It is a general rule of evidence that the acts or declarations of a conspirator will not be admitted in evidence against his co-conspirator unless they were done or made pending the conspiracy, and were in furtherance of the common design. See the opinion in extenso on the question, and for a case in which the declarations of a co-conspirator were, under the rule announced, improperly admitted against the accused.

APPEAL from the District Court of Webb. Tried below before the Hon. J. C. Russell.

The conviction in this case was for the theft of a beef, the property of McDowell & Sheldon, and the penalty assessed was a term of two years in the penitentiary.

The opinion succinctly but fully states the case.

No brief for the appellant has reached the Reporters.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This is a conviction for theft of a beef steer. The facts, condensed, are these: McDowell & Sheldon owned a certain stag beef about nine years old, which ranged in Encinal county. Said beef was driven to the Tauquecillas ranch in Encinal county by Esteban Cortez. The State's witness, Prajedes Vaca, states that he knew defendant and his brother Esteban; that the beef was killed at his pens. The night before it was killed Esteban Cortez and Cesario, defendant, arrived at his ranch about the same time, Cesario arriving about seven or eight o'clock and Esteban afterwards, about nine o'clock, and the next morning he saw the beef in the pen. Cesario arrived on horseback, immediately came into the house and laid down, complaining of severe pains in his stomach and head; he remained in bed very sick for four days. When he, Cesario, came to witness's house he was alone. The witness saw no beef with him. Cesario said nothing except to complain of his head and stomach,

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and was in bed when the beef was killed. On the second day, when his mother came after him, he was put in the wagon along with the slaughtered beef, and he and his mother and his brother Esteban, and the meat, all left for Laredo. When placed in the wagon defendant was out of his head. Faustino Vaca states that he was at the ranch on the night when the beef was brought there, and that it was after dark; they all, that is Esteban, defendant and the beef, arrived together. This witness also states that he did not know of anything connecting defendant with the beef, except what Esteban told him.

Now, stating the case most strongly against defendant, it would be this: that a beef steer was stolen. Defendant and his brother drove this steer up to the ranch of Vaca at night and two days afterwards his brother slaughtered the beef, placed the meat in a wagon with defendant and his mother (defendant being out of his mind), and left the ranch for Laredo. The theory of the State was that defendant and his brother had entered into a conspiracy to steal the beef, slaughter the same and carry the meat to Laredo. In the absence of defendant, Esteban Cortez told Vaca and Davolino that defendant had been hooked and thrown from his horse by the beef while he was helping him (Esteban Cortez) to lasso the beef; that to save himself defendant had to shoot the beef twice, and that this was how defendant came to be hurt. Appellant was not present when the beef was slaughtered, nor did he have anything to do with placing the meat in the wagon; his only connection with the beef, if connected at all, being that he and his brother drove it to the ranch at night.

Was this fact sufficient to show *prima facie* a conspiracy, not only to steal, but to slaughter and take the meat to Laredo? We think not. The conspiracy was at an end, if there was a conspiracy at all, when the beef was driven to Vaca's ranch and the defendant left it and went into the house. This being the case, the declarations of his brother, Esteban Cortez, were clearly inadmissible.

But let us concede that proof of conspiracy was made, and that the conspiracy was pending, not consummated, when Esteban made the declarations. Were they admissible against his co-conspirator, the defendant? After giving this subject a thorough investigation, we must answer the question in the negative. "The principle upon which the acts and declarations of one conspirator are admitted in evidence against the person prosecuted

Opinion of the court.

is that, by the act of conspiracy together, the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design; thus rendering whatever is done or said by any one in furtherance of that design a part of the *res gestæ*, and therefore the act of all." (3 Greenl. Ev., 94.) It will be seen from this author that only the declarations which are made during the conspiracy and in furtherance of its object are admissible. Declarations which are merely narrations of fact are to be rejected. (United States v. Gonerell, 8 Crim. Law Mag., 614.) Applying this rule to this case before us, we find that the declarations of Esteban Cortez were not in furtherance of the common design, but simply a narrative of past events. They are not of the *res gestæ* of the conspiracy and are hearsay merely.

The conspiracy being at an end—consummated—why are not the declarations of a co-conspirator admissible as well as if made during the pendency of the conspiracy? Simply because the declarations can not be more nor less than narratives of past events. They can not further the common design, because there is no common design to further. Now, the principle is the same whether the conspiracy be ended or pending. To be admissible, the declaration must not be a narration of past events, but must be in furtherance of the common design. This is the rule laid down by an almost unbroken line of authority. But a narrative of past events may be in furtherance of the common design, and hence admissible. Illustration: A will perform the part allotted to him when B shall do a certain thing to be performed by him. B acts, does that which is required of him, and writes to or verbally informs A that the thing has been done. This is a narrative of a past event, but it is also in furtherance of the common design, and hence admissible. The general rule is that to be admissible the conspiracy must be pending, and the acts or declarations must be in furtherance of the conspiracy—the common design. (Phillips's Ev., 200 and 201; 2 Starkie's Ev., 326; 24 State Trials, 704.)

The declarations of Esteban Cortez being inadmissible, the case was one of circumstantial evidence alone; if admissible, it was not. There was no error in treating, in the charge, the case as one of direct evidence, but the error consisted in admitting in evidence the declarations of Esteban Cortez. The judgment is reversed and the cause remanded. *Reversed and remanded.*

Opinion delivered December 16, 1887.

Statement of the case.

No. 2767.

B. F. DODSON v. THE STATE.

INCEST—ACCOMPLICE TESTIMONY—FACT CASE.—See the statement of the case for evidence *held* to be insufficient to support a conviction for incest, inasmuch as it rests upon the uncorroborated testimony of a witness shown by the other proof to be a *particeps criminis*.

APPEAL from the District Court of Wood. Tried below before the Hon. F. J. McCord.

The appellant in this case was convicted of incest with one Rosa Brower, his step-daughter, and his penalty was assessed at a term of two years in the penitentiary.

Rosa Brower, the first witness for the State, testified that she was nineteen years old, and lived in Wood county, Texas, with her mother and the defendant, who was her step-father. In the room occupied by the witness in the defendant's house, there were three beds. One of them was occupied by the defendant and his wife and child. The witness and a young sister occupied the next bed, which was near the one occupied by defendant and his wife. The third bed was occupied by the defendant's widowed brother and some of his children. About midnight on the night of March 15, 1887, the defendant left his bed and came to that of the witness. He placed his hand on witness's shoulder. Witness pushed his hand off and told him to go away. Instead of going away the defendant got into bed with witness, and had carnal intercourse with her without her consent. He held witness securely in bed, and directed her not to speak a word. Defendant repeated that operation in the same manner at the same place on several subsequent nights. Witness at no time made an outcry, being restrained by fear of the defendant. The same fear kept her from telling any person of her compulsory copulation with defendant. She told no one until she gave birth to a child, when she told her mother, and the officers who came to investigate the matter, that the defendant was the father of her child. No man other than defendant had ever had carnal intercourse with the witness. Witness was engaged, at time of the outrage upon her, to be married to one Mose Dumas. They

Statement of the case.

were to have been married on the Sunday succeeding July 5, 1887, but Mose withdrew; witness did not know why. He had previously broken off a prior engagement with witness to marry, but witness did not know why. The defendant always treated the witness well, except in the matter of forcing her, against her will, to submit to his carnal passion. Witness often attended parties in her neighborhood, and was sometimes escorted by Mose Dumas. Witness spent one or two nights at the house of Ed. Jones during his illness. She denied that Doctor Hardeman ever treated her for cancer of the breast and sore leg. He did examine her breast on one occasion.

The State closed.

Mrs. Agnes Dodson, the wife of defendant, was his first witness. She testified that the prosecutrix, Rosa Brower, was her daughter by her first husband. Witness and defendant were legally married to each other at the time of this alleged offense. Rosa had lived many years with witness and defendant. At the time of the alleged offense, the defendant's brother, ——— Dodson, and his motherless boys were living at defendant's house. Defendant and witness and their children, including Rosa, and defendant's brother and his children all occupied the same room. Defendant and witness and one of their children all occupied one bed. Rosa and her sister occupied another bed, and defendant's brother and his children occupied the third bed, which bed was nearer to Rosa's bed than the one occupied by witness and defendant. A person lying in the bed occupied by defendant's brother could touch the foot of Rosa's bed. The older children of the household, except Rosa, slept in a room overhead and immediately above the room occupied by the parties named. The defendant's brother and his children came to defendant's house in February, 1887. He was then, and is yet, a widower. The witness spent almost her entire time at home, rarely leaving home, and never for any considerable length of time. Witness had never observed any undue intimacy between defendant and Rosa, and, had any such intimacy existed, she would most certainly have seen or known it. She had never had any cause to suspect such an intimacy between her husband and her daughter. Rosa never complained to witness of any ill treatment at the hands of defendant until her child was born, when she declared that the defendant was the father of the child. Witness suspected Rosa's pregnancy some time before the birth of the child, but, thinking Rosa would confide her

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troubles to her, said nothing to her about the matter. When Rosa reached her period of labor, she awakened witness with her moaning, and asked witness to give her something to relieve her pains. Witness told defendant to get and give her some spirits of turpentine and paregoric. After a labor of some time the child was born. It lived about an hour and a half, and died in the arms of a Mrs. Parker, who was present at the birth. Defendant asked, after the death of the child, if it would not be better to bury the body in the church yard. Mrs. Parker remarked, in reply, that the child, which was a very small one, was no better than the witness's dead child, which was buried in the yard near the house, and that it, too, could be buried in the yard. The child's body was then wrapped in some clean rags and placed in a box, and the defendant then, as he was asked to do, buried it in the yard. The child was only partially developed, was not more than a five months conception, and did not weigh exceeding three or four pounds.

Witness was at home on the night of March 15, 1887, and every night for a long period before, and ever since that date. She never, on any occasion after the said date, observed anything peculiar or unusual in the demeanor, manner or appearance of her daughter Rosa. The defendant habitually slept behind the witness, and next to the wall, and never did and could not get out of bed after having once retired, without awakening the witness, who was an exceptionally light sleeper. Rosa often attended parties with young men, and during March, 1887, she spent several nights at the house of Ed. Jones, during his illness. She told witness that she was engaged to marry Mose Dumas, and that her marriage was appointed for the Sunday succeeding July 5, 1887. She attended several parties in company with Mose Dumas.

Cross examined, the witness said that she was at home when the officers, Bob Terrell and John James, and county attorney W. A. Hart, came there, which was about a week after the birth, death and burial of Rosa's child. Witness showed the child's grave to the parties named, who exhumed the body and examined it. Witness denied that she told Mr. Hart that the defendant was the father of the child. She denied that she told Hart, Terrell or Jones that, on one occasion, at Mrs. Parker's house, she observed undue familiarity between defendant and Rosa, and afterwards reprimanded defendant about it, and that defendant replied: "It is nothing but your d—d old jealous mouth,

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and if you don't hush I will leave the place." She did tell the officers that on one occasion, in March, 1887, about midnight, she caught the defendant getting back into his bed, and that the fire was covered up, and that she told him it looked suspicious. That was not the truth. Witness did not know why she made such a statement to the officers. It just "popped" into her head to tell it. It was the practice of witness to cover up the fire at night. Hart was drinking when he came to witness's house. He showed he was drunk by asking very silly questions, and witness smelled whisky on his breath.

Mrs. Rosa Parker testified, for the defense, that she was at defendant's house when Rosa Brower's child was born. That child was about a five months conception, and was very small. It lived about an hour and a half, and died in witness's arms. Defendant proposed that the child should be taken to the church yard and buried. Witness replied that the child was no better than the child of defendant's wife, which was buried in the yard, and that it should be buried there too. Accordingly, the child was buried in the yard by the defendant. Witness had often seen defendant and Rosa together, but never observed anything suspicious about their manner towards each other.

Doctor Hardeman testified, for the defense, that he had been a practising physician for eighteen years. Witness was several times called to treat Rosa Brower for cancer of the breast and for sore leg. Ed Jones called the defendant to treat the girl, who was then at his house. Witness, after examining Rosa's breast, told her that he would not dry it up, as she was pregnant; to which Rosa made no reply. Rosa's general reputation for both truth and chastity was very bad. Witness had no medical certificate, and was a practitioner without having passed examination before the medical board of Wood county.

G. A. Green testified, for the defense, that he had lived near and had known Rosa Brower all of his and her lives. He knew that Rosa's reputation for truth and veracity and for chastity was very bad and had been bad for about four years. He had always known defendant, and had never heard defendant's moral character assailed until he was charged with this offense. He had often seen defendant and Rosa together, but had never seen any undue intimacy or improper familiarity between them. Cross examined, the witness said that, up to a short time before the birth of her child, Rosa attended all the parties given in the neighborhood. So far as the witness knew, she was never

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avoided, snubbed or mistreated. J. J. Bailey and Alex. Fouse testified, for the defense, substantially as did the witness Green. The defense closed.

W. A. Hart testified, for the State, in rebuttal, that in his official capacity as county attorney he went to the defendant's house as soon as he heard of the birth of Rosa Brower's child, and that she imputed its paternity to the defendant. Mrs. Dodson stated to the witness and Terrell that, on one occasion, at Mrs. Parker's house, she observed the defendant and Rosa acting with undue familiarity towards each other, and that she afterwards "got after" defendant about it, when defendant told her it was "nothing but her d—d old jealous mouth, and that, if she did not hush up, he would leave the house." She also said: "On one occasion, about the last of March, I woke and found the defendant getting in bed. The fire was covered up and the house was dark. I asked him what he was doing."

Ed Dumas testified, for the State, that he had lived within two miles of the defendant for about eight years. He knew Rosa Brower well. Her reputation for truth, veracity and chastity had always been good. She attended all parties given in the neighborhood, and appeared to be a social favorite. Witness had never seen her snubbed or slighted by any of the society people.

E. M. Bates testified, for the State, that he had long known Rosa Brower, and had always regarded her as a pure and virtuous girl. She attended all the parties and social gatherings, and always appeared to be a prime favorite.

The motion for a new trial raised the question discussed in the opinion.

D. W. Crow, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. We are of the opinion that the indictment is sufficient. We find no material error in the charge of the court. But we are clearly of the opinion that the evidence does not support the conviction.

Although the witness Rosa, with whom the incestuous intercourse is alleged to have been committed, states that she did not consent to the intercourse, it is very clear from her testimony that she made no serious, determined or positive resistance to it.

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Her testimony, taken in connection with the other facts in evidence, shows conclusively, we think, that if the crime of incest was committed upon her by the defendant, she was a principal in the crime. Her testimony, therefore, was that of an accomplice, and insufficient, without corroboration, to sustain a conviction. There is not a particle of evidence in the record which corroborates, in any material respect, the testimony of the witness Rosa, while, on the other hand, her statements are strongly disproved by circumstances, and her credibility is made doubtful by the testimony of several witnesses who state that her reputation both for veracity and chastity is bad. We think the court erred in refusing to grant the defendant a new trial, upon the ground that the evidence did not support the verdict.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered December 17, 1887.

COURT OF APPEALS OF TEXAS.

GALVESTON TERM, 1888.

No. 2383.

GEORGE WARE, JR., v. THE STATE.

1. **ASSAULT AND BATTERY—INTENT.**—To constitute assault and battery, unlawful violence must be used upon another, and such violence must be used with the intent to injure the person upon whom it is inflicted. Unaccompanied by such intent, the violence, however unlawful, does not constitute assault and battery.
2. **SAME—EVIDENCE—FACT CASE—NEW TRIAL.**—The intent to injure will be presumed when an injury has been inflicted, but when no injury has been inflicted no such presumption will obtain, and the intent must be proved. The proof in this case failing to show the infliction of an injury, and preponderating against the intent to inflict injury, the conviction is against the evidence, and the trial court erred in refusing a new trial.

APPEAL from the County Court of Victoria. Tried below before the Hon. R. H. Coleman, County Judge.

The conviction in this case was for an assault and battery upon the person of Sylva Ware, who was shown by the evidence to be the mother of the appellant. The penalty assessed was a fine of twenty-five dollars.

The information under which this prosecution was had was based upon a complaint filed by George Ware, Sr., the father of the accused, and the husband of the alleged injured party. The complainant was likewise the first and the principal witness for the State. His narrative discloses a domestic episode happily more picturesque and interesting than tragic in its results. The *casus belli*, it appears, was a goat. That goat, four years before the eventful day alleged in the information, was

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the corporeal personal property of the defendant. The defendant, however, under the influence of a sudden generous impulse, bestowed it absolutely upon his younger brother. From that time until the day of the battle it became a tenant in common upon the premises of the witness, waxing fat and festive on the provender of the witness, and unconsciously generating and nourishing a feud that was to become an issue in field and forum between the donor on the one side and the custodians of the donee on the other.

A few days before the assault alleged in this information, the defendant asserted a proprietary claim to the goat, and bore it from the witness's house to his own. Passing the defendant's house a day or two later, the witness discovered the goat foraging on the patch of the defendant, and forthwith, acting on behalf of his son and ward, he escorted it back to the home of its youth. On the evening of that same day, the defendant, in his cart, drove to the witness's yard fence, disembarked, entered the yard, laid violent hands on the rope attached to the goat, and essayed to bear that innocent animal off *vi et armis*. To this proceeding the witness protested that the goat belonged, not to the defendant, but to his brother, and was in the care, control and custody of him, the witness. The defendant retorted that he had merely loaned the animal to his brother, and started to drag it off. Thereupon the witness seized the rope at the end remotest from the goat. Defendant at that time held the rope at a point near the goat. Witness was now reinforced by his wife and the other members of his family, who severally seized different parts of the rope, and the tug of war commenced. Witness's wife held the rope nearest the defendant. Defendant reached out his right hand and pushed the witness's wife—how hard the witness could not say—and told her to go to the house. Instead, however, of going to the house, witness's wife advanced upon the defendant's rear, when, jerking suddenly at the rope, he brought his elbow violently against his mother's breast. The tug at the rope was then resumed, when defendant, changing his tactics, produced a pocket knife and with a strong blow suddenly severed the rope. The result of this maneuver was to place witness and his entire family *hors du combat*, and, while they lay stretched on their several backs, the defendant bore off the goat in triumph.

The witnesses for the defense, corroborated by the remaining witness for the State, testified, in substance, that they saw the

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defendant enter his father's yard and undertake to lead off a goat. His father, mother and other members of the family seized the rope attached to the goat, and attempted to prevent its removal by defendant. Defendant then cut the rope near where he held it. The cutting of the rope was followed by the fall of the several parties opposed to defendant, and defendant's escape with the goat. Defendant did not strike or otherwise violently use Mrs. Ware, nor did he attempt to do so.

The motion for new trial raised the questions discussed in the opinion.

J. L. Hill, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. To constitute an assault and battery, unlawful violence must be used upon the person of another, and such violence must be used with the intent to injure the person upon whom it is inflicted. Unlawful violence unaccompanied by such intent does not constitute the offense. (Willson's Texas Crim. Laws, secs. 809, 811.) The intent to injure will be presumed when an injury has been inflicted, but when no injury has been inflicted such presumption will not prevail, and the intent must be proved. (Id., sec. 812.)

In the case before us, conceding that the defendant used unlawful violence upon the person of his mother, the alleged assaulted party, it is not shown that she was injured by such violence either physically or mentally, or that he intended to inflict any injury upon her, but on the contrary the evidence shows that he had no such intention.

In our opinion the verdict is not supported by the evidence, and the trial court erred in refusing the defendant a new trial. The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered January 7, 1888.

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No. 2325.

JOHN GILLELAND v. THE STATE.

1. **PRACTICE—CONTINUANCE—EXCEPTION.**—It is a settled rule of practice in this court that the refusal of a continuance will not be revised in the absence of a bill of exceptions.
2. **SAME—EVIDENCE.—BILL OF EXCEPTION** taken to the admission of evidence should clearly disclose the nature of the objection; otherwise it is not entitled to be considered by this court. Objections not affirmatively stated in a proper bill of exceptions are to be treated as waived.
3. **SAME—FLIGHT** of an accused, after indictment and release on bail or recognizance, is a fact which may be proved for the State by showing the forfeiture of the bail bond or recognizance.
4. **THEFT—CHARGE OF THE COURT.**—The trial court, in a theft case, charged the jury as follows: "Upon the trial of one charged with the theft of a horse, the possession of the horse without a written bill of sale containing a specific description of the horse is *prima facie* evidence against the accused that the possession is illegal." Held erroneous, as upon the weight of evidence.
5. **SAME—FACT CASE.**—The trial court charged the jury as follows: "When one charged with theft is found in possession of the stolen property, if he gives a reasonable explanation of his possession of the property, it then devolves upon the State to show such statement to be false; otherwise the accused must be acquitted." See the opinion and the statement of the case for evidence which, in view of the law thus correctly expounded by the charge, is held insufficient to support the conviction.

APPEAL from the District Court of Goliad. Tried below before the Hon. H. C. Pleasants.

The conviction in this case was for the theft of a horse, the property of Amos Rowland, in Goliad county, Texas, on the eighteenth day of February, 1886. A term of five years in the penitentiary was the penalty assessed.

Amos Rowland was the first witness for the State. He testified that in February, 1886, he lived in Llano county, Texas. On the night of the eighteenth day of that month, the horse described in the indictment, which was the property of the witness, and which was then in his possession, was stolen from the witness's pasture, situated in the said Llano county. That horse was one of three horses which the witness had in that pasture on that night. Witness missed his said horse on the morning of

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February 19, 1886, when he discovered that the gap in the fence surrounding his pasture was down. The tracks showed that three horses entered the pasture at the gap, and four went out. The tracks also showed that one of the horses leaving the pasture was a led horse, as his tracks appeared sometimes on one side and sometimes on the other of a straight trail left by another horse. Witness searched several days for his horse, but failed to find him. He then heard of the sudden departure from the county of a man named Gilleland, who had previously lived in the neighborhood. He further learned that Gilleland's parents lived in Goliad county, and thereupon he wrote to the sheriff of Goliad county, giving a description of the horse, and the name of the defendant as the man who had recently left Llano county. Within a short time the witness was notified by the sheriff of Goliad county that he had the horse in his possession and Gilleland in jail. Witness then went to Goliad county and found his horse in the possession of George Stormfeltz, the sheriff of said county. That horse was taken from the witness's pasture in Llano county, about two hundred and fifty miles distant from Goliad, without the knowledge or the consent of the witness. The witness had never seen the defendant to know him, until he saw him in the Goliad county jail, at the present term of the court. Witness denied that he ever told Fulcroed or Tilly, or any other person in Goliad county, that he did not believe the defendant was guilty of this theft. He did say, however, to them and other parties, that he believed Perry Swift was the principal leader in the perpetration of the theft, and that, if defendant would turn State's evidence, and his testimony would secure the conviction of the other two persons who participated in the theft, he, witness, would be content.

R. H. Adams testified, for the State, that in February, 1886, he lived in Llano county, Texas, with Mr. Walton, the uncle of the defendant, and was well acquainted with the defendant. At the time of the theft of Rowland's horse the defendant was living at his uncle's house, in Llano county. He had been there about a month. The defendant then owned neither horse, saddle nor bridle, and was using a horse that belonged to one Robinson, who lived on the Llano river. Mr. Walton, the defendant's uncle, lived about seven miles distant from Rowland's pasture. Defendant borrowed the witness's saddle on the eighteenth day of February. On the next morning one Perry Swift brought the saddle back to the witness. The defendant did not come back

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to Walton's house after he left on the eighteenth day of February. Witness did not know where he went to, nor what use he made of witness's saddle while he had it in possession. He merely asked the loan of the saddle, and witness loaned it to him without asking him any questions.

R. F. Winn testified, for the State, that he lived in Llano county, Texas, about two miles from the residence of Mr. Walton, the uncle of the defendant. A saddle was stolen from the premises of the witness on the night of February 18, 1886. Witness had seen the defendant in that neighborhood prior to that time, but had not seen him there since. Witness did not know what, if any, business the defendant pursued in Llano. He did not know who stole his saddle.

George Turner testified, for the State, that early in March, 1886, he, at the request of Sheriff Stormfeltz, of Goliad county, went to the place where the defendant then was, in Goliad county, arrested him and took possession of the horse then in his possession, which corresponded with the horse described to witness by the said sheriff. Witness arrested the defendant about eight o'clock in the morning, while the defendant was in the act of saddling the horse. He delivered the defendant and the horse to Sheriff Stormfeltz, who subsequently delivered the horse to Rowland. When witness arrested the defendant, defendant said that he purchased the horse from a man who lived near Austin. He did not designate the particular place near Austin where he purchased the horse, nor did he mention the name of the man from whom he purchased, nor did he state the price he paid for the animal.

Sheriff Stormfeltz testified, for the State, that on or about March 10, 1886, he received a letter from the State's witness Rowland, of Llano county, describing a horse which had been recently stolen from him, and giving the name of the defendant. Witness thereupon dispatched George Turner to a place in Goliad county where the defendant was said then to be, for the purpose of arresting the defendant and recovering the horse. Turner returned with the defendant and a horse which corresponded with the horse described by Rowland in the letter. Rowland afterwards identified the horse as his property, and as the same referred to by him in his letter, and witness delivered the horse to him. Defendant was released on bail soon after his arrest. His bond obligated him to appear before the grand jury at the succeeding term of the district court. He, however, left the

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country before the court convened, and before indictment was returned against him, and his bond was forfeited and subsequently was collected by witness. The witness, in May, 1887, heard of the defendant in Robertson county, Texas. He thereupon procured a capias to Robertson county, upon which capias defendant was arrested, and witness sent for and got him, and had since held him in custody. Defendant's father was a citizen of Goliad county. The State concluded its case by introducing in evidence the proceedings of the court upon the forfeiture of the defendant's appearance bond.

Abner Ricketson was the first witness for the defense. He testified that in February, 1886, he lived in Llano county, Texas, near the residence of Mr. Walton, the uncle of the defendant. On a day in said February, not earlier than the nineteenth nor later than the twenty-second, the witness, defendant, Pete Rose and Joe Ellis, then riding along the public road near Perry Swift's place in Llano county, met a man named Norton, who lived near Austin, and who was leading a horse which he offered for sale. The defendant bought that horse from Norton, paying him therefor the sum of seventy-five dollars, ten dollars of which the witness loaned the defendant, as defendant had but sixty-five dollars with him. Norton did not execute a bill of sale to cover the horse, nor did he say where he got the horse. Perry Swift was near but not present at the transaction, but he saw the trade, and saw the possession of the horse delivered to defendant by Norton. Witness, defendant, Rose, Ellis and Norton presently overtook Swift and went with him to Swift's house, where Swift was told of the trade, and the trade was discussed. Swift, who was the witness's brother-in-law, then lived about two miles from Walton's place, and between seven and eight miles from Rowland's place. The horse purchased by the defendant from Norton was the animal subsequently claimed by Rowland. At the time of the trade, and when witness loaned the defendant the ten dollars, his acquaintance with defendant was very slight. He knew that defendant was living at Walton's, but had not "run" or associated with him prior to that time. The witness did not see defendant in Llano county after the transaction between him and Norton; did not know where he went to, nor had he ever been repaid his ten dollars. He did not then know that defendant's father lived in Goliad county. Witness had never made an effort to collect his ten dollars, and

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never, after the transaction, endeavored to find the defendant or ascertain his whereabouts.

William Gilleland, the defendant's brother, was his next witness. He testified merely to his untiring efforts to secure the attendance of Rose, Ellis and Swift upon this trial, to testify to the purchase by defendant of the horse from the man Norton. Witness had a conversation with the State's witness, Rowland, in Llano county, in the course of which conversation Rowland said that he did not believe that defendant stole the horse, and that he wanted the defendant to do no more than tell from whom he got the horse, so that he could prosecute the thief.

Phillips Fulcrod testified, for the defense, that pending the trial he met the State's witness Rowland at the foot of the court house steps, in Goliad, and engaged him in conversation about this case. In the course of that conversation Rowland said, in effect, that he did not believe John Gilleland stole his horse, and that he asked of Gilleland no more than that he tell who he got the horse from. William Tilly testified substantially as did Fulcrod, and the case was closed.

The motion for new trial raised the questions discussed in the opinion.

J. L. Hill, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. No bill of exception having been saved to the overruling of defendant's application for continuance, he is not entitled to have the matter reviewed in this court. The last decision to this effect is in Scott's case. (23 Texas Ct. App., 522.)

There is but a single bill of exception in the record, and that was saved to the admission of testimony over objection of defendant. What the objection was is not stated in the bill. The rule is that the bill must set forth the objections which were interposed, and that objections not affirmatively presented are deemed to have been waived. (Bryant v. The State, 18 Texas Ct. App., 107, and authorities cited.) Independently of this rule, the evidence, we think, was clearly admissible as a circumstance going to show flight and an effort to avoid a trial by the defendant. Flight of a defendant after indictment, and after his release on bail or recognizance, by showing the forfeiture of the

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same, is a fact which may be proved by the State. (*Hart v. The State*, 22 Texas Ct. App., 563; *Aiken v. The State*, 10 Texas Ct. App., 610; *Gose v. The State*, 6 Texas Ct. App., 121.)

In the fourth paragraph of the charge, the court instructed the jury that, "upon the trial of one charged with the theft of a horse, the possession of the horse without a written bill of sale containing a specific description of the horse is *prima facie* evidence against the accused that the possession is illegal." Such an instruction has repeatedly been denounced by this court as decidedly erroneous, it being upon the weight of evidence. (*Willeys v. The State*, 22 Texas Ct. App., 408, and numerous authorities cited.)

A special instruction, given at the instance and request of defendant, it is true, did modify the vice of the charge, and perhaps might with some reason be held to have cured it. (*Garcia v. The State*, 12 Texas Ct. App., 336.) Still, this is mere speculation, at best, and, had an exception been reserved to it, notwithstanding the giving of the requested instruction, we would, under well settled rules, have been compelled to have reversed the judgment on account of the error.

In paragraph two of the charge of the court, the jury were specifically and correctly instructed that, "when one charged with theft is found in possession of the stolen property, if he give a reasonable explanation of his possession of the property, it then devolves upon the State to show such statement to be false; otherwise the accused must be acquitted." Applying this charge to the facts as proven on the trial and shown in the record, we find that when defendant was first found in possession of the stolen animal by the deputy sheriff who was sent to arrest him, he told the officer that "he had bought the horse from a man who lived near Austin." He did not say what the man's name was, or the price he paid for the horse, or where he bought the horse." This explanation in itself is entirely reasonable. Not only so, but defendant proved its truth by his witness Ricketson, who testified with minute circumstantiality to the transaction, when and where it took place, the name of the party who sold defendant the horse, and the price paid by defendant, together with the names of several other parties who were present and also witnessed the sale and purchase.

This explanation by defendant, and the testimony offered by him to support it, have not been disproved nor shown to be false. We are of opinion the verdict and judgment are against the

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evidence and charge of the court; wherefore the judgment is reversed and the cause remanded for another trial.

Reversed and remanded.

Opinion delivered January 7, 1888.

No. 2404.

MARTIN GUEST v. THE STATE.

1. **THEFT—INDICTMENT—VERDICT.**—Though under an indictment charging theft of cattle in the usual form, a conviction may be had either for the theft defined in article 749 of the Penal Code or for the misdemeanor of driving cattle from their accustomed range as defined in article 767 of the Penal Code, the verdict, to be sufficient, must show with reasonable certainty of which offense, the felony or the misdemeanor, the accused was found guilty.
2. **SAME—NEW TRIAL.**—When the indictment charges an offense which includes other offenses, and all the offenses covered by the indictment are submitted to the jury by the charge of the court, a general verdict of guilty, assessing a penalty applicable to either of the offenses, is uncertain, and will not support a judgment. The rule is that "when a verdict is so defective and uncertain that the court can not know for what offense to pass judgment, it should be set aside." The indictment in this case charged the accused with the felony of cattle theft, and also with the misdemeanor of driving cattle from their accustomed range. The verdict found the defendant "guilty as charged in the indictment," and assessed the penalty applicable as well to the misdemeanor as to the theft defined in the said article 749 of the Penal Code, and the court adjudged the conviction to be for the felony. *Held*, that the verdict was illegal in failing to designate the offense of which the jury found the accused guilty, and does not authorize the judgment. The verdict should not have been received, but, having been received, the trial court should have awarded a new trial.
3. **SAME—EVIDENCE—CHARGE OF THE COURT—VOLUNTARY RETURN OF STOLEN PROPERTY.**—When, as in this case, the evidence on a trial for theft tends to show a voluntary return of the stolen property by the accused to the owner, within a reasonable time, and before prosecution has been instituted, it devolves upon the trial court to charge the jury upon the law applicable to such defense. See the statement of the case in *Guest v. The State*, ante, page 235, for evidence *held* to raise the issue of a voluntary return of the alleged stolen property, within the statutory meaning of that defense.

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4. **SAME—POSSESSION OF RECENTLY STOLEN PROPERTY.**—See the statement of the case in *Guest v. The State*, ante, page 235, for a state of proof under which the trial court should have instructed the jury with reference to the law applicable to a defendant's explanation of his possession of stolen property, made when his possession was first challenged. In refusing the special charge upon the subject requested by the accused, the trial court erred.
5. **SAME—PRACTICE.**—The refusal of the trial court to permit counsel to read, in his argument to the jury, the opinion of this court, delivered upon the hearing of the former appeal in this case, was not error.
6. **THEFT—EVIDENCE—INTENT—FACT CASE.**—See the statement of the case in *Guest v. The State*, ante, page 235, for evidence *held* insufficient to support a conviction for cattle theft, inasmuch as it does not establish the fraudulent intent. •

APPEAL from the District Court of Red River. Tried below before the Hon. D. H. Scott.

The conviction in this case was had under an indictment which charged the appellant with the theft of four head of cattle, the property of J. R. Johnson, in Red river county, Texas, on the fifteenth day of April, 1887. The penalty assessed against the appellant was a fine of two hundred and twenty-five dollars. The opinion of the court discloses the proceedings under which this result was reached.

The transaction involved in this prosecution is the same for which, in a previous trial, the appellant was convicted for theft, and the conviction in this case was obtained upon substantially the same evidence. A full statement of the facts will be found in the report of the former case, which appears in the present volume, beginning on page 235.

The motion for new trial raised the question discussed in the opinion.

Sims & Wright, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. I. Conceding that, under an indictment charging theft in the usual form, a defendant may be convicted of the theft defined by article 749 of the Penal Code, or of the misdemeanor defined by article 767 of the Penal Code, and that the court did not err in so instructing the jury, still we must hold that the verdict should with reasonable certainty show of

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which offense—the felony, or the misdemeanor—the defendant was found guilty. In this case the verdict reads: “We, the jury, find the defendant guilty as charged in the bill of indictment, and assess his punishment at a fine of two hundred and twenty-five dollars.” The punishment assessed is applicable to the felony defined by article 749, and also to the misdemeanor defined by article 767. We can not, therefore, determine from the punishment assessed whether the defendant was found guilty of the felony or of the misdemeanor.

The trial court upon this verdict adjudged the defendant guilty of the felony—that is, of the theft of cattle—but we are unable to perceive from the record the authority for so adjudging. The verdict finds him guilty as “charged in the bill of indictment.” He is charged in the bill of indictment not only with the theft of the cattle, but with the misdemeanor of willfully driving the cattle from their accustomed range without the consent of the owner. Both these offenses were, by the charge of the court, submitted to the jury. It is impossible to determine from the record to which of said offenses the verdict was intended to apply. If the verdict had found the defendant guilty of *theft* as charged in the indictment, it would have been sufficient, although the punishment assessed was a fine, as such punishment is authorized by the theft defined by article 767. (*Foster v. The State*, 21 Texas Ct. App., 80.)

But when the indictment, as in this case, charges an offense which includes other offenses, and all the offenses covered by the indictment are submitted to the jury by the charge of the court, a general verdict of guilty, assessing a penalty applicable to either one of two offenses, is uncertain and will not support a judgment. “When a verdict is so defective and uncertain that the court can not know for what offense to pass judgment, it should be set aside.” (*Slaughter v. State*, 24 Texas, 410; *Alston v. State*, 41 Texas, 39; *Senterfit v. State*, Id., 186; *Buster v. State*, 42 Texas, 315.) We can find no precedent which holds such a verdict as the one rendered in this case to be sufficient to authorize a judgment.

It is a matter of vital importance to the defendant whether the jury found him guilty of a felony or a misdemeanor. If he has been convicted of a felony, he is thereby deprived of important civil rights, which deprivation would not result from a conviction for a misdemeanor. It was for the jury, and not for the court, to declare whether he was guilty of a felony or a mis-

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demeanor. The jury failed to specify his crime, or even to intimate that it was a felony, and yet the court has adjudged him guilty of felony. We are clearly of the opinion that the verdict does not authorize the judgment rendered and entered, or any other judgment against the defendant. The verdict should not have been received by the court, but having been received, it should have been set aside, and a new trial should have been granted the defendant.

We are of the opinion that the evidence as presented to us on this appeal fairly presents the issue of a voluntary return of the alleged stolen cattle by the defendant into the actual possession of the owner within a reasonable time, and before any prosecution had been commenced against defendant for taking of said cattle. We think this issue should have been submitted to the jury under instructions from the court applicable to the facts in evidence. While the special charge upon this issue, which was requested by defendant's counsel, was not as full and definite as it should have been, it was correct in the abstract, and sufficient to call the court's attention to the issue, and to the law governing such issue. (Penal Code, art. 738; *Bird v. The State*, 16 Texas Ct. App., 528; *Dupree v. the State*, 17 Texas Ct. App., 591; *Allen v. The State*, 12 Texas Ct. App., 190; *Shultz v. The State*, 20 Texas Ct. App., 315.) The cattle returned to the owner were the identical cattle taken from him by the defendant, and there is nothing in the evidence to show that they had undergone any substantial change. (*Horseman v. The State*, 43 Texas, 353; *Grant v. The State*, 2 Texas Ct. App., 164.)

We are further of opinion that the court erred in refusing to instruct the jury in regard to defendant's explanation of his possession of the cattle, made when the owner of the cattle demanded them of him. We can not agree with the learned trial judge that the right of the defendant to the possession of the cattle was not challenged or called in question, so as to require of him an explanation of his possession of them. He had possession of the cattle; the owner of the cattle demanded them of him. It was not only the right of the defendant, but it was absolutely demanded of him by the circumstances, in order to exculpate himself from the presumption of guilt of the theft of the cattle, arising from his possession of them, to explain that possession, and remove such presumption if he could do so. He did explain his possession of the cattle, and his explanation, viewed in connection with the other evidence in the case, is, to

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our minds, not unreasonable or improbable, and its falsity was certainly not proved by the State. (Willson's Texas Crim. Laws, section 1300.)

In other respects than those above noticed, we find no error in the charge of the court, or in the refusal of requested charges. We do not agree with counsel for defendant that the eighth paragraph of the court's charge is in conflict with the opinion of this court rendered on the former appeal of this case, or that said paragraph is erroneous. We think it correctly states the law.

In view of article 783 of the Code of Criminal Procedure, and of decisions independent of that provision, we do not think that the trial court erred in refusing to allow counsel for the defendant to read to the court and jury, and comment thereon, the opinion of this court rendered on a former appeal of this cause. We do not think, either, that the defendant could have been prejudiced by this ruling of the trial court. (Dempsey v. The State, 3 Texas Ct. App., 429; Warren v. Wallace, 42 Texas, 472; 9 Crim. Law Mag., p. 638, sec. 15.)

With regard to the sufficiency of the evidence to support the conviction, we must say that, after a very careful consideration of the facts as presented to us, we could not permit the conviction to stand, even were there no reversible error disclosed in the record. It might, perhaps, be held by us that the evidence is sufficient to warrant a conviction of the misdemeanor defined in article 767 of the Penal Code, because, to constitute that offense a *fraudulent intent* accompanying the act is not essential. But a fraudulent intent is an essential element in *theft*, and to our minds, in this case, the evidence not only fails to prove such intent, but shows that it did not exist in the mind of the defendant at any time with respect to the cattle involved. We think the trial court erred in refusing to grant the defendant a new trial upon the ground of the insufficiency of the evidence to support the verdict, construing the verdict as one convicting the defendant of theft.

Because of the several errors we have mentioned, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered January 21, 1888.

Opinion of the court.

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No. 2330.

ELECK JEFFERSON v. THE STATE.

1. **PLEADING—COMPLAINT—INFORMATION—ARREST OF JUDGMENT.**—The constitutional and statutory provisions which require that all prosecutions in this State, whether by information or indictment, shall be carried on "in the name and by the authority of the State of Texas," necessitate that it so appear from the information or indictment, but do not in misdemeanor cases require that it shall so appear from the complaint. The trial court did not, therefore, err in this case in overruling a motion in arrest of judgment based upon the insufficiency of the complaint because it does not begin with the words: "In the name and by the authority of the State of Texas."
2. **SAME—PLEA.**—Unless the transcript on appeal shows that the accused pleaded to the information against him, or that a plea of not guilty was entered for him by order of the court, a conviction will be set aside.

APPEAL from the County Court of Freestone. Tried below before the Hon. T. W. Sims, County Judge.

This conviction was for misdemeanor theft, and the penalty assessed against the accused was a fine of one hundred dollars. The record brings up no statement of facts.

Kirven, Gardner & Etheredge, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. This prosecution in the court below was upon an information for a misdemeanor, which information was based upon an affidavit or *complaint*. A motion in arrest of judgment attacked the sufficiency of the *complaint*, because the same did not commence with the words: "In the name and by the authority of the State of Texas."

It is contended that, inasmuch as it is both statutory and constitutional that "all prosecutions shall be carried on in the name and by the authority of the State of Texas" (Const., art. 5, sec. 12; Code Crim. Proc., art. 19), and, inasmuch as the complaint is the initial step in the prosecution, and the very basis and foundation upon which the information rests, therefore it is essential to its validity that it should be commenced "in the name and by the authority of the State of Texas."

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Our statute prescribing the requisites of a complaint does not require the use of these words (Code Crim. Proc., art. 236), as is done with regard to the requisites for indictments and informations. (Code Crim. Proc., arts. 420 and 430.) There can be no question but that the words are indispensable to indictments and informations. (*Saine v. The State*, 14 Texas Ct. App., 144.) But a complaint is not required to set forth the offense with the same particularity as is an indictment or information (*Arrington v. The State*, 13 Texas Ct. App., 551), and in the case of *Bell v. The State*, 18 Texas Court of Appeals, 53, an affidavit or complaint which did not contain these words was held sufficient. It is true the words are used in the Form No. 545, page 236, Willson's Criminal Forms, and without doubt it would be better to use them in the complaint as well as in the information. (*Lane v. The State*, 16 Texas Ct. App., 172.)

A similar provision to the one quoted above from our present Constitution will be found in the Constitution of the Republic of Texas, article 4, section 4. (Pas. Dig., 33). Construing that provision with reference to an indictment for gaming, Justice Wheeler, in the early case of *Drummond v. The Republic*, 2 Texas, 156, says: "No prescribed form of words is necessary in order that the prosecution be 'carried on in the name and by the authority of the Republic of Texas.' It is enough that the prosecution is conducted by the proper law officer acting under the authority and conducting the prosecution in the name of the government." As we have seen, our statutes now require that informations and indictments shall contain the words: "In the name and by the authority of the State of Texas." This is made, in fact, the first requisite to those instruments. (Code Crim. Proc., arts. 420, 430, subdiv. 1.) In this case the prosecution was conducted under an information containing those words. We hold that the motion in arrest of judgment was properly overruled.

There is a fundamental error apparent of record for which the judgment must be reversed. It is no where made to appear that the defendant pleaded to the charge in the information, nor that a plea to the same was entered for him. Without a plea there was no issue to try. (*McFarland v. The State*, 18 Texas Ct. App., 313; *Roe v. The State*, 19 Texas Ct. App., 89.)

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered January 21, 1888.

Statement of the case.

No. 2418.

JIM SPEARS v. THE STATE.

1. **ACCOMPLICE TESTIMONY—CHARGE OF THE COURT.**—With respect to the testimony of a State's witness, the trial court charged the jury as follows: "In contemplation of our law with reference to accomplice testimony, the court charges you that John Thomas, the witness introduced by the State, is an accomplice with the defendant," etc. *Held:* Error, because the said charge was tantamount to an instruction to the jury that defendant was guilty as well as Thomas. The charge should have instructed the jury that the witness Thomas was an accomplice in the commission of the offense, and that the defendant could not be convicted upon the testimony of Thomas unless it was legally corroborated.
2. **FENCE CUTTING—INDICTMENT.**—See the statement of the case for the charging part of an indictment *held* sufficient to charge the offense of fence cutting.

APPEAL from the District Court of Milam. Tried below before the Hon. J. N. Henderson.

The charging part of the indictment reads as follows: " * * * that Jade Parker, Bud Milam, Julius Thompson, Henry Jackson, Sam McLaughlin, Mat Milam, Jack Spears and Jim Spears, late of the county of Milam, on the thirtieth day of March, in the year of our Lord 1887, with force and arms, in the county of Milam, and State of Texas, did then and there wantonly and willfully, and without the consent of W. S. Carothers, the owner, and with intent to injure the said S. W. S. Carothers, cut, injure and destroy a fence there situate, said fence being then the property of said W. S. Carothers, and not the property of said Jade Parker, Bud Milam, Julius Thompson, Henry Jackson, Sam McLaughlin, Mat Milam, Jack Spears and Jim Spears, or either of them; and that the said Jade Parker, Bud Milam, Julius Thompson, Henry Jackson, Sam McLaughlin, Mat Milam, Jac Spears and Jack Spears, nor either of them, did not then and there own or reside upon land enclosed by said fence; against the peace and dignity of the State." The penalty assessed against the appellant, who was alone upon trial, was a term of two years in the penitentiary.

The disposition of this appeal, upon the questions involved, does not call for a statement of the facts proved.

Argument for the appellant.

E. L. Anthony, for the appellant: This indictment is bad, and the motion to quash the same should have been sustained, first, because it is duplicitous; second, because it does not allege that appellant did not reside on or own land inclosed by said fence; and, third, because it is ambiguous in stating the name of the owner of the fence—or, in other words, it charges the ownership in W. S. Carothers, and the intent to injure S. W. S. Carothers, different persons, so far as we know.

As to the first proposition, if we use that great and artful dodge invented by ingenious courts in the long ago, to aid incompetent district attorneys in the performance of their official duties, and say that certain parts of the charging part of this indictment may be rejected as surplusage, then we can reject the language "without the consent of W. S. Carothers, the owner thereof," and we might have a good indictment under article 648a, Willson's Penal Code, with a penalty affixed at not less than one nor more than five years. But, "reversing the engine," and rejecting all the charging part of the indictment as surplusage except "did then and there," * * * "without the consent of W. S. Carothers, the owner," * * * "injure" * * * "a fence there situate, said fence being then the property of W. S. Carothers, and not the property of Jim Spears," it would then be a good indictment under article 684, Willson's Penal Code, with a penalty of not less than ten nor more than one hundred dollars, and, in addition thereto, imprisonment in the county jail for not exceeding one year.

This court, in *Roberts v. The State*, 17 Texas Court of Appeals, 148, has held that article 684a did not repeal article 684. Then we have, by rejecting as surplusage one part, one offense, and by another part another offense, under different statutes with different penalties. It therefore would not come under the rule announced in *Nicholas v. The State*, 23 Texas Court of Appeals, 326, but would come under the opposite rule as announced in *The State v. Dorsette*, 21 Texas, 656, which is the true rule.

How can the court tell which part to reject as surplusage? Will you make it a good indictment for the misdemeanor (Art. 684), or will you make it a good indictment under 684a, for the felony, with the tail end of the exception in the enacting clause of the statute lopped off? *Duke v. The State*, 42 Texas, 455, says that the exceptions in the enacting clause must be negatived in the indictment, and this court adheres to the rule. Now, does it mean that the pleader must negative the entire excep-

Argument for the appellant.

tion or only a part of it, and as to this appellant, Jim Spears, it is not negatived at all. If the court would pretend to know which part of the indictment should be rejected as surplusage, it would certainly be reasonable, and would reject that part the rejection of which would leave a good indictment—a perfect one. In such case it could only have it charging an offense under article 684, a misdemeanor, of which the district court would not have jurisdiction; and the trial must be set aside and the indictment transferred to the proper court (county court.) Or if the court should reject allegations to make it a felony (Art. 684a) indictment, it would be a very sorry indictment.

Second. The exception in article 684a is not negatived as to Jim Spears. The indictment does not read that “the said defendants nor either of them did not reside,” etc., but undertakes to name and designate by name which of the defendants did not reside, etc., upon the enclosed land, and does name such as did not reside within the enclosure, but as to appellant Jim Spears *nil dicit*. Now, can it be claimed that, as to appellant, Duke v. The State, *supra*, has been followed? I should say not. *Ergo*, it is bad.

Again, *all* of the exception is not negatived. Perhaps some part of the exception is contingently immaterial, in view of the other part being stated as to the other defendants, *not* this appellant, though. Still, however immaterial, in the particular case at bar, as a matter of good pleading *the whole* of the exception must be negatived, and that too as to appellant. (Duke v. The State, *supra*.)

Again: The indictment is bad, inasmuch as it does not allege an intent to injure “W. S. Carothers, the owner,” but alleges an intent to injure another and a different person than the owner, viz: “S. W. S. Carothers.” Now, this court holds that middle initials of names do not make any difference in the allegations of names of persons, and that it is the first initial and the surname which make the name of the party. Now, rejecting middle initials as immaterial, we have as the owner W. Carothers, while the person intended to be injured was S. Carothers. The intent to injure the owner is a material element of the offense, and the variance between the owner’s name and that of the person injured or intended to be injured is fatal. We therefore, firmly believe that the indictment is fatally defective on these grounds, or is good only for a misdemeanor under article 684, and in either case the court ought to set aside the conviction and

Argument for the appellant.

remand the case for a new trial. (Code Crim. Proc., arts. 420, 421, 425; Willson's Texas Crim. Laws, secs. 684, 684a; Dorsette v. The State, 21 Texas, 656; Nicholas v. The State, 23 Texas Ct. App., 326; Bish. Crim. Proc., sec. 436.)

The court erred in its general charge to the jury that John Thomas is an accomplice with the defendant; which was, in effect, telling the jury that the defendant cut the fence, and thus placing the fact prominently before the jury that John Thomas was to be given full credit; it being a charge upon the weight of evidence and on the credibility of the witness.

The trial judge is required by the spirit of the law, not only not to state a positive opinion as to the weight of the evidence, or to positively discuss the facts, but it also requires him to avoid even the appearance of an intimation as to the facts, and to so guard the language of his charge that no inference, however remote or obscure, may be drawn by the jury as to the facts in evidence from the charge as given them, which is made the law of the case; and if the objectionable clause is excepted to at the trial, it must necessarily reverse the case.

The court charged the jury as follows: "In contemplation of our law with reference to accomplice testimony, the court charges you that John Thomas, the witness introduced by the State, is an accomplice with the defendant, and before you can convict the defendant, his testimony is to be corroborated as above required." Throughout the entire charge this same idea prevails. The clause quoted was specially excepted to at the time, and a bill of exceptions was reserved.

The court in its charge tells the jury what constitutes a principal and what constitutes an accomplice; tells them that the testimony of an accomplice must be corroborated, and gives them to generally understand that the testimony of an accomplice is by law required to be corroborated by other evidence tending to connect the defendant with the commission of the offense charged, before they can convict upon an accomplice's testimony.

But throughout the whole charge of the court prominently stands out in bold relief before the jury the idea contained in the clause quoted, namely, that the witness and the defendant cut the fence. The language used can mean no less, namely: "The witness John Thomas is an accomplice with the defendant." The court here tells the jury in substance that the witness John Thomas and defendant cut the fence; there is no doubt

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about that; but, because the law requires Thomas to be corroborated, you must look for additional evidence, but you need not trouble about Thomas, as he has told you the truth. For this formality of corroboration required by law you need only look! Such is the effect of the language of the court in this charge. In other words, it withdraws from the jury the right of the jury to pass upon the credibility of Thomas, and the weight to be given his testimony, and intimates very strongly to the jury the opinion of the court that appellant did cut the fence, as charged. No other construction can possibly be placed upon the language. It is true that near the end of the court's charge it tells the jury that they are the exclusive judges of the weight of the evidence, and the credibility of the witnesses, but this does not remove the the court's intimation as to weight and credibility. It is there. It pervades the whole charge. It can not be shaken off. And may, might, or could not the jury have drawn a conclusion of the court's opinion? Then it was error, reserved and excepted to at the time, and must reverse the case. (Code Crim. Proc. arts. 677, 685; Stieckie's case, 7 Texas Ct. App., 174; Maddox's case, 2 Id., 404; same case, 12 Id., 434.)

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. In instructing the jury in relation to the testimony of a State's witness, the court used the following language: "In contemplation of our law with reference to accomplice testimony, the court charges you that John Thomas, the witness introduced by the State, is an accomplice with the defendant," etc. This portion of the charge was excepted to by the defendant, and is presented for our revision by proper bill of exception.

It is manifest that the court erred in giving such charge. It explicitly tells the jury that the witness Thomas is an accomplice *with the defendant*. This was equivalent to telling the jury that the defendant was criminally connected with the offense charged against him. Thomas, in his testimony, confessed his own guilt of the offense; that he was a principal in the commission of the offense. Therefore, to instruct the jury that Thomas was an accomplice *with the defendant*, was to instruct that the defendant was equally guilty with Thomas. The instruction should have been that the witness Thomas was an accomplice in the commission of the offense charged, and that a conviction upon

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his testimony, unless corroborated, etc., would not be warranted. The vital issue in the case was the participancy of the defendant in the commission of the offense. The above quoted paragraph of the charge determines that issue against the defendant, indirectly but plainly, because the witness Thomas could not have been an *accomplice with the defendant* in the commission of the offense without the defendant's being also *particeps criminis*. Because of this erroneous charge, the judgment must be reversed and the cause remanded for another trial. (*Stieckey v. The State*, 7 Texas Ct. App., 174; *Maddox v. The State*, 2 Texas Ct. App., 404; same case, 12 Texas Ct. App., 434.)

In our opinion the indictment is a good one. It is not subject to the objection of duplicity urged against it. Nor does it fail to sufficiently negative the exceptions contained in the statutory definition of the offense. Other objections made to the indictment are, we think, hypercritical and without substantial merit.

It is unnecessary that we should determine the correctness of the ruling of the court in refusing defendant's application for a continuance. With respect to other errors assigned and insisted upon, we also deem it unnecessary that we should express an opinion. Because of the erroneous charge above specified, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered January 25, 1888.

No. 2416.

J. L. BOWERS v. THE STATE.

1. **MAIMING.**—To constitute the offense of maiming, the act must be done both willfully and maliciously.
2. **SAME—TERMS DEFINED—CHARGE OF THE COURT.**—A *willful* act is one committed with an evil intent, with legal malice, without reasonable ground for believing the act to be lawful, and without legal justification. A *malicious* act is one committed in a state of mind which shows a heart regardless of social duty, and fatally bent on mischief; a wrongful act, intentionally done without legal justification or excuse. In all trials for maiming, the legal signification of the terms "willfully" and "maliciously" must be explained to the jury by the charge of the court.

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3. **SAME—EVIDENCE—INTENT.**—See the statement of the case for evidence which, tending to show that the act of the accused was neither willfully nor maliciously done, within the legal signification of those terms, was erroneously excluded by the trial court, such evidence being competent upon the question of intent.
4. **SAME—PRACTICE—CONSPIRACY.**—The general rule obtains in this State that each conspirator is responsible for everything done by his confederates which follows immediately in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. In other words, the act must be the ordinary and probable effect of the wrongful act specifically agreed upon, so that the connection between them may be reasonably apparent, and must not be a fresh and independent product of the mind of one of the confederates, outside of, or foreign to, the common design. Whether or not the act was the ordinary and probable effect of the common design or conspiracy, or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, are questions which, under proper instructions, should be submitted to the jury for solution. See the opinion for a state of case to which the rule applies.
5. **SAME.**—Biting off a *portion* of a member of a person's body does not necessarily constitute maiming. In all such cases the jury should be left, under proper instructions, to determine whether or not the injury was such as substantially to deprive the injured party of the member.

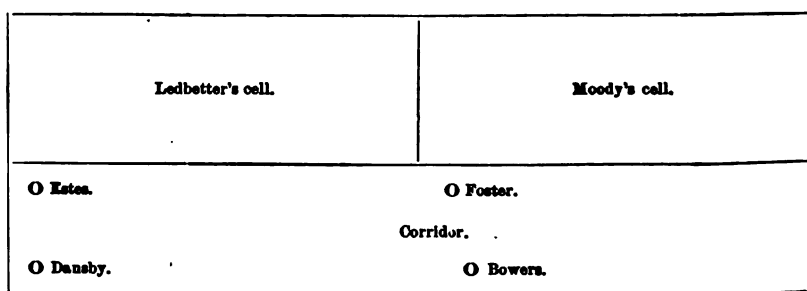
APPEAL from the District Court of Falls. Tried below before the Hon. Eugene Williams.

The conviction in this case was for maiming one H. A. Dansby, by biting off a portion of his thumb, and the penalty assessed against the appellant was a term of two years in the penitentiary.

H. A. Dansby was the first witness for the State. He testified, in substance, that for some time prior to July 4, 1887, he, the witness, the defendant, one T. J. Estes and one R. W. Ledbetter were confined together as prisoners in the same apartment, up stairs, in the jail of Falls county, Texas, at Marlin. A short while before the said July 4, their number was increased by the confinement in the same apartment of Giles Cheek, E. G. Moody and Ed Foster. On or about June 29, 1887, a negro confined in jail became obstinate and insubordinate and resisted the control of the jailer. When the sheriff attempted to place the said negro in restraint, he resisted and was shot and killed by the sheriff inside the jail. When the inquest over the dead body of the negro was held, on the morning of July 4, the witness was placed

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upon the stand and testified to the circumstances attending the killing of the negro as they appeared to him. After the inquest the witness was turned into the "run around" or corridor of the jail to converse with his wife, who called to see him. He was returned to the cell about midday. At about that time Lee Estes, a brother to T. J. Estes, came to the jail and had a private talk with T. J. Estes. Soon after Lee Estes left, the defendant, in the presence of T. J. Estes and the other white prisoners, told witness that he was to be tried after dinner. Witness asked what he was to be tried for. Defendant replied that witness would be told in good time. Estes then said that his brother Lee, while at the jail on that morning, told him that witness testified upon the inquest upon the body of the negro that he, T. J. Estes, told the negro who was killed to fight and resist the jailer with a certain lock and chain that lay near the cell door, and that defendant furnished the negro with a knife for the purpose of resisting the jailer, all of which he said was a d—d lie told by witness. He said further that witness was going to be tried for swearing to those lies. Witness went into Ledbetter's cell with Ledbetter, after dinner, and the other prisoners went into the adjoining cell. While in Ledbetter's cell witness heard the prisoners in the other cell talking. He could not hear what they said, but heard them mention his name repeatedly. Soon after this the witness went into the corridor and took a seat not far from Ledbetter's cell. Estes, Foster and defendant then came out of the other cell, and took, respectively, the positions shown in the following diagram:



They then began to talk to witness about his testimony on the inquest over the body of the negro. Witness got up to go back into Ledbetter's cell, when Estes caught him about the arms. Witness squatted to break Estes's hold, when defendant

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rushed up and caught him. While witness was struggling to free himself from the clutches of defendant and Estes, defendant called to Foster: "If you are going to do what you agreed to do, come on." Foster then ran up and caught witness by one leg. The parties then threw witness to the floor in Ledbetter's cell. His head struck the floor violently. Estes then got across witness's breast, defendant across his loins, and Foster across his legs. Witness then got one of his hands in Estes's collar, but Estes got it loose and placed witness's thumb in his mouth and proceeded to bite it. While Estes was thus biting it, defendant kicked witness's arm. The kick released the witness's thumb from Estes's mouth. Estes then choked witness into insensibility. The witness did not know how long he was insensible, but when he came to himself he found Jailer Norwood, armed with a pistol, standing in the cell. Witness then got up and found a piece of his thumb, which had been torn from the end of that member, lying on the floor. He picked it up, placed it in his pocket, and afterward gave it to Mr. Norwood. The piece mentioned was torn diagonally from across the thumb, and included about two-thirds of the nail. Doctor Rice dressed the witness's thumb on the same day. Defendant beat the witness in the face before his thumb was bitten off. Estes and defendant had been unfriendly toward the witness for some time before this.

R. W. Ledbetter, for the State, testified to the material facts substantially as did the witness Dansby, except that, according to this witness, Dansby was not thrown violently to the floor by defendant and Estes, but, on the contrary, was very gently laid out by them, and his head could not have been hurt or injured by contact with the floor. Dansby was once released by Estes and defendant, but he, Dansby, rushed upon Estes and the fight was renewed. When the fight first began witness began calling for Deputy Sheriff Norwood, and continued to call until he came. At that time Estes had Dansby bent about half over and was on him. Dansby may have then been holding Estes, but witness could not so say. After the fight was over, witness observed that part of Dansby's thumb was gone, and his hand was bleeding. When jailer Norwood came to the scene of the fight, and saw Estes on Dansby's back, he placed his pistol to Estes's side and told him to release Dansby on pain of being shot, and Estes obeyed. The jailer then confined Estes, defendant and Foster in a cell and locked them in. The witness, long prior to this occur-

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rence, knew of the bad feeling existing between Dansby, Estes and defendant, and once requested the jailer to confine Dansby and Estes and defendant in separate cells. Witness had heard Estes and defendant accusing Dansby of swearing falsely about them on the inquest over the body of the negro killed in the jail, and had been fearful, from their talk, that they intended to hurt Dansby. If Dansby became unconscious while he was choked by Estes, witness did not know it, and did not think, from the character of his movements shortly after the choking, that he did. His face, however, became purple, and was badly scratched.

Deputy Sheriff C. A. Norwood was the next witness for the State. He testified, in substance, that he was the jailer in charge of the Falls county jail at Marlin. On the day alleged in the indictment, the witness, being at Judge Wharton's office on the south side of the square, about one hundred and fifty yards from the jail, heard the disturbance at the jail. He ran immediately to the jail, and found Dansby near the cells, on the inside, lying on his back. The defendant was sitting on Dansby's stomach, striking him in the face, and Estes was at his head, choking him. Foster appeared to be walking around the parties, and old man Ledbetter following him to prevent him from striking Dansby. Witness several times ordered the parties to desist. As they paid no attention to him, he ran to his room and secured his pistol. Returning, he thrust his pistol through the bars, and against Estes's side, and told Estes that he would kill him if he did not release Dansby, whom he was then holding half bent and choking. The defendant was then standing near. Estes called to witness not to shoot; and released Dansby. Witness then ordered defendant into one of the cells, and afterwards placed Foster in, and locked them in. Witness then observed that Dansby's hand was bleeding, and asked him if his finger had been bitten off. He replied in the affirmative, and took from his pocket, and exhibited to witness, a fragment of his thumb, which witness afterwards gave to Doctor Rice. Witness knew that the feeling of defendant and Estes for Dansby was not friendly. He knew that fact by the character of talk he overheard among the several prisoners. He heard defendant, on one occasion, say that Dansby would swear to any d—d lie in the interest of the sheriff. About two-thirds of the nail, and a somewhat larger piece of flesh was bitten from the ball of Dansby's thumb.

Doctor S. P. Rice testified, for the State, that he dressed Dans-

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by's thumb after it was bitten. A part of the ball of the thumb and about two-thirds of the nail were bitten off. A small part of the soft bone at the end of the thumb was also bitten off. The thumb would be tender, troublesome and sore for a year or more; would always be stumpy, and the nail would grow hooked over the end of it, but it would eventually be a fair thumb.

The State closed.

Ed Foster was the first witness for the defense. He testified that he was confined in the Falls county jail with defendant, Estes and Dansby, at the time of the difficulty, the particulars and details of which, together with its results, he related as did Dansby and Norwood. The witness stated further that he knew that Estes and defendant were angry with Dansby because of his testimony upon the inquest over the body of the negro killed in jail by the sheriff. They often talked to witness about Dansby and his said testimony. Lee Estes, a brother of the prisoner Estes, visited the jail on the morning of July 4, 1887, and had a long conversation with his brother. After he left, Estes and defendant discussed Dansby and his evidence before the inquest, and asked witness to help them "strap" Dansby for what he had sworn to. Witness first declined to help them, but finally agreed to help them whip Dansby if they would solemnly agree not to do Dansby any injury. It was then agreed that defendant and Estes were to undertake to whip Dansby, and witness was to help only in the event he was called upon, and upon condition that Dansby was not to be injured. In pursuance of this agreement, defendant and Estes caught Dansby, and defendant called upon witness to help. Witness caught Dansby's legs and helped throw him to the ground. Estes then proceeded to choke Dansby, and defendant to beat him in the face. Estes got Dansby's thumb in his mouth, when defendant kicked Dansby's arm, with the result stated by the previous witnesses. Witness knew that Dansby's thumb was not mashed off by having the cell door closed upon it, but it was a fact that, after being locked up together after the fight, defendant, Estes and witness agreed to say and to maintain that Dansby's finger was mashed off by the door closing upon it. During that time, witness heard Estes say that he had bitten off Dansby's d—d old finger. Witness had been indicted, tried and acquitted of this same offense. Restating the circumstances of the fight substantially as they were related by the witness Dansby, this witness stated that when Dansby was released by Estes and defendant, after his thumb was

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kicked out of Estes's mouth, Dansby rushed upon Estes, and defendant joined the fight in the interest of Estes. Witness then interfered to prevent further fighting, saying to defendant: "I thought we were not to hurt him. If you are going to turn it into a fight, but one of you shall fight him." It was about this time that jailor Norwood appeared with his pistol, compelled the release of Dansby, and locked witness, Estes and defendant in one of the cells. The cell door was constructed of heavy iron which closely fitted into the door facing, and was very sharp at the edge. If it should catch a man's finger in closing violently, it would undoubtedly cut it off. When near that door, however, Dansby lay across it, with his shoulder on the threshold.

On his cross examination the witness stated that, judging from what he had heard defendant and Estes say of Dansby, their feeling towards Dansby was very bitter. After Lee Estes's visit to the jail, the witness heard the prisoner Estes say that his brother Lee told him that, on the inquest over the negro's body, Dansby swore that he, the prisoner Estes, told the negro to use a certain lock and chain to resist the sheriff, and that defendant dropped a knife into the negro's cell, to be used for like purpose by the negro, all of which, he said, was a d—d lie. Witness was certain that the door had nothing to do with the maiming of Dansby's thumb. Witness agreed to help Estes and defendant strap Dansby with a leather strap, only upon condition that Dansby was not to be hurt. At this point the counsel for the defense asked the witness if "prisoners have laws in jail?" This question being objected to by the State, the defendant's counsel asked the witness if there was any understanding on the part of Dansby by which he agreed to this whipping. Witness answered that Dansby was not a party to the agreement.

The excluded evidence referred to in the third head note of this report was that proposed to be elicited from the witnesses Ledbetter and Foster, to the effect that the prisoners confined in the Falls county jail at the time of this alleged offense had a code of written laws, adopted by themselves, and posted in the cells. Under that code certain penalties were prescribed for certain offenses. Lying was one of the offenses denounced by that code, and the penalty prescribed therefor was whipping with a certain leather strap or boot leg. Dansby was familiar with those laws, participated in their adoption, and had frequently

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participated in the enforcement of the same upon other prisoners.

The motion for a new trial raised the questions discussed in the opinion.

P. P. Norwood, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. To constitute the offense of maiming, the act must be done both *willfully* and *maliciously*. A *willful* act is one committed with an evil intent, with legal malice, without reasonable ground for believing the act to be lawful, and without legal justification. A *malicious* act is one committed in a state of mind which shows a heart regardless of social duty and fatally bent on mischief; a wrongful act intentionally done without legal justification or excuse.

In trials for this offense the legal signification of the words "willfully" and "maliciously," must be explained to the jury. (Willson's Texas Crim. Laws, secs. 876 and 877.) This, we think, was substantially and sufficiently done in this case. But we are of the opinion that the court committed a material error in rejecting the testimony of the witnesses Ledbetter and Foster, offered by the defendant for the purpose of showing, or as tending to show, that the violence inflicted upon the injured party was not inflicted willfully and maliciously, within the legal signification of those terms. We think the rejected testimony was pertinent to the issue of intent, and that the defendant was entitled to have it placed before the jury for their consideration, in connection with the other evidence adduced.

It is insisted by counsel for the defendant that the law applicable to the facts of this case was not given in charge to the jury. It appears from the evidence that the defendant, one Estes, Dansby, the injured party, and others were confined as prisoners in the county jail. Dansby had testified as a witness at an inquest held over the dead body of a negro prisoner who had been killed in said jail a short time before the difficulty occurred which is the foundation of this prosecution. Defendant and Estes charged that he had given false testimony before said inquest, and they and others of the prisoners agreed that for so falsely testifying they would whip Dansby with a leather strap, an instrument which they had in jail. In pursuance of this

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agreement they assaulted Dansby, who resisted them. Estes, assisted by the defendant and others, threw Dansby upon the floor. Estes and Dansby were fighting each other, and during the fight, while the parties were down on the floor, Dansby was deprived of a portion of one of his thumbs.

It is clear from the evidence, we think, that the injury to Dansby's thumb was caused by the teeth of Estes. Estes seized Dansby's thumb with his teeth, and the defendant kicked Dansby on the arm, thus extricating Dansby's thumb from Estes's teeth. It is not clear from the evidence what motive actuated the defendant in kicking Dansby on the arm; whether his purpose was to aid Estes in the struggle, or to release Dansby's thumb from Estes's teeth. But we will not pause to consider or discuss this feature of the case.

The important and controlling question presented by the facts is, whether or not the defendant is criminally responsible for the act of Estes in biting Dansby's thumb. It is made clear by the evidence that defendant, Estes and others had entered into a conspiracy to whip Dansby with the leather strap. Does the fact that defendant had entered into, and engaged in the execution of, such a conspiracy render him liable with Estes for biting Dansby's thumb?

Upon the subject of the responsibility of a conspirator for the acts of his co-conspirators, the rule, as we deduct from the authorities, is that each conspirator is responsible for everything done by his confederates which follows incidentally in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. In other words, the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of or foreign to the common design. (1 Whart. Crim. Law, 9 ed., secs. 214-220, 397; 1 Bish. Crim. Law, 7 ed., secs. 640, 641; *Lamb v. The People*, 96 Ill., 73; *Ruloff v. The People*, 45 N. Y., 23; *Thompson v. The State*, 25 Ala., 41; *Frank v. The State*, 27 Ala., 37; *Williams v. The State*, 9 Crim. Law Mag., 480; *Kirby v. The State*, 23 Texas Ct. App., 13.) The last cited case is not in conflict with the rule as above stated, but is in perfect harmony with it when viewed with reference to the facts before the court.

Now, the rule being as we have stated it to be, the responsi-

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bility of the defendant for the said act of Estes depends upon the solution of another question; that is, was the act of Estes in biting Dansby's thumb the ordinary and probable effect of the wrongful act of attempting to whip Dansby with a leather strap, or was it a fresh and independent product of the mind of Estes, outside of or foreign to the common design? If the former, the defendant is responsible for the act; but if the latter, he is not responsible for it. How must this question be solved? By the jury alone. It is a question of fact, and within the exclusive province of the jury.

In the recent and celebrated case of *Spies v. The People*, N. E. Reporter, page 865, the court said: "Whether or not the act done by a member of a conspiracy naturally flowed from and was done in furtherance of the common design are questions of fact for the jury." We are of the opinion that the court erred in not submitting the question above stated to the jury, accompanied by proper instructions explaining the rules of the law hereinbefore announced. This phase of the case as made by the evidence was not covered by the charge. Defendant's counsel requested a special charge relating to it, which, although not full and accurate, was sufficient to direct the attention of the court specially to the issue.

Another issue which should have been submitted to the jury is, whether the injury inflicted on Dansby's thumb constituted maiming. Biting off a portion of a member of the body is not necessarily maiming. It should be left to the jury to determine in all such cases whether the member was so injured as to substantially deprive the injured party of it. (Willson's Texas Crim. Laws, sec. 877.) This issue the court failed to submit to the jury, and in so failing did not give the jury the whole law applicable to the evidence.

Because of the errors mentioned, the judgment is reversed and the cause is remanded for a new trial.

Reversed and remanded.

Opinion delivered January 25, 1888.

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No. 2420.

CHARLEY MCDANIEL v. THE STATE.

1. **PRACTICE.**—A MOTION IN ARREST OF JUDGMENT is available upon any ground which would be good upon exceptions to an indictment or information for any substantial defect therein; and article 529 of the Code of Criminal Procedure enumerates the only exceptions, under our practice, to the substance of an indictment. The failure of the minutes of the court to show the appointment of the foreman of the grand jury, or that the grand jury was sworn, does not come within the enumerated defects.
2. **THEFT—EVIDENCE—CHARGE OF THE COURT.**—However improbable may be the evidence in support of a defense, it is the duty of the trial court to submit the issue to the jury under proper instructions. A defense witness in this case testified that he was present and witnessed the defendant's purchase of the alleged stolen animal. *Held*, that in failing to submit the question of a purchase *vel non* to the jury, the charge of the court was erroneous.

APPEAL from the District Court of Leon. Tried below before Earle Adams, Esq., Special Judge.

The indictment in this case charged the appellant and Jim Mathews, jointly, with the theft of one head of cattle, the property of H. C. Coburn, in Leon county, Texas, on the fifteenth day of July, 1886. The appellant was alone upon trial, and was convicted, his punishment being assessed at a term of two years in the penitentiary.

H. C. Coburn was the first witness for the State. He testified that he knew the defendant, whom he pointed out in open court. On or about the first day of April, 1886, the witness missed his certain yearling from the range near his house in Leon county. That yearling was a peculiarly fleshmarked animal, but was neither marked nor branded. It had a crook in its tail, the result, the witness thought, of a bend in the tail bone. The witness had milked its mother at the house where he fed her, and it was her custom to come up at night. The yearling, which was not yet weaned, always came up with its mother until the evening above stated, when the mother for the first time came up alone.

The witness did not see his yearling again until the following July, when he found it in a pasture in either Navarro or Lime-

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stone county, about twenty miles from Mexia. Tom Smith, Bentley, Wilson and "Yankee" were with witness when he found his yearling in the pasture. Witness at once identified his yearling and took it home. On reaching home it at once recognized and sucked its mother. The witness lived about ten miles from the Leon county line, in Leon county. He knew that up to April 1, 1886, the yearling had never been out of Leon county. Witness never saw his said yearling in the possession of the defendant. He did not know who drove the yearling off. Witness did not consent for the defendant nor any other person to take or drive off his yearling. Defendant lived in Leon county, about two miles distant from the witness.

Americus Walker testified, for the State, that he was engaged in working on the public road on April 1, 1886. Defendant and Jim Mathews were road hands at that time, and belonged to the same gang that witness did, but neither of them worked with that gang on the said first day of April, 1886. Witness did not know what they did nor where they went on that day.

Tom Smith testified, for the State, that he knew the defendant and Jim Mathews. The witness, in April, 1886, was in the employ of Mr. Bentley, as agent in the purchase of cattle. On the second or third day of the said April, James Mathews delivered to the witness, as the agent of Bentley, a bunch of seventeen cattle. The witness received the cattle in person and examined them closely. Defendant was not present at the delivery of the seventeen head. The animals were put in Bentley's brand, sold to Walker, and were then taken by the witness to Walker's pasture, about twenty miles from Mexia. Two or three months later, the witness, Bentley, "Yankee," and perhaps others went with Coburn to the pasture to look for a yearling which Coburn claimed to have lost. On reaching the pasture Coburn at once pointed out a certain yearling which he declared to belong to him, and to be the one he lost, which was delivered to him and he took it off. That yearling was one of the animals bought by Bentley from defendant (Mathews?). That animal was very peculiarly marked. It had red sides and a white back; was bow legged, and had a very unusual crook in its tail. It was neither marked nor branded when bought by Bentley.

John Bentley testified, for the State, circumstantially as did the witness Tom Smith, except that, according to his impression, his purchase of the seventeen animals from Mathews was made

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on April 7, 1886, instead of April 2 or 3, as stated by Smith. Of this, however, the witness was not positive.

— Benton ("Yankee") testified, for the State, that on Saturday, April 3, 1886, he saw the defendant and James Mathews, on the public road, about three miles from Bentley's cattle pens, driving a small bunch of cattle towards the said pens. The witness did not observe the cattle closely enough to be able to identify any of them. Witness met defendant afterward, on the same evening, and he told witness that he had left the cattle with his partner, Mathews, who was to sell them to Bentley.

Luther Rankin testified, for the State, that he lived in Leon county, Texas. On or about April 1, 1886, while at work in his corn, he saw the defendant and James Mathews driving a small bunch of cattle through an old field back of the witness's place. The witness did not take special notice of the cattle, but knew the men well

The State rested.

Joe Mathews was the first witness for the defense. He testified that he was the brother of James Mathews, and the brother-in-law of the defendant. On the first day of April, 1886, an old negro named George Washington came to the witness's house and inquired for the defendant. Defendant not being at the witness's house, the said Washington directed witness to tell defendant that he, Washington, "would have those yearlings for him on the next morning." On the following morning the witness witnessed the sale by said Washington of four yearlings to defendant and James Mathews, wrote the bills of sale himself, and saw defendant pay the said Washington sixteen dollars for same. One of the four yearlings thus sold by Washington to defendant was the yearling subsequently claimed by Coburn, and the others were the three subsequently claimed by Mrs. Walker. Those yearlings were found at the defendant's pen in Leon county. The witness knew nothing about the negro George Washington, who had but recently moved into the neighborhood. Two bills of sale were executed by Washington, both of which were written by the witness. He wrote them separately on a leaf torn from his blank book. According to his recollection a strip was torn from that leaf, about the middle, or at all events between the bills of sale as written by him. Witness was road overseer on April 1, 1886, and with the gang worked the road on that day. Neither the defendant nor James Mathews worked the road with witness's gang on that day. A few days after the

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defendant's purchase of the yearlings from Washington, the witness saw Americus Walker hunting for the yearlings subsequently claimed by his mother. Witness said nothing to him about defendant's purchase from Washington, but told him where he had recently seen a bunch of Mrs. Walker's cattle. Neither of George Washington's hands were crippled.

Yow and Frank Wilcox testified, for the defense, that they saw the negro George Washington at the house of Mr. Mathews, on the morning of April 1, 1886, and heard him ask for the defendant. Early on the next morning the defendant and Joe Mathews left the house together, and Joe Mathews returned within an hour. Yow testified, also, that, on that said April 1, the defendant tried to borrow witness's horse to drive cattle on, but witness declined to lend it.

Tom Tatum testified, for the defense, that he lived near Mr. Mathews's place and knew George Washington, whom he engaged to work on his place by the month. George was on witness's place on March 31, 1886, and on April 1, until near noon. Witness did not know where he was after that hour on that day. It was too wet to work. If said Washington was crippled in any way, witness did not know it.

The defense closed.

Wat. Tinson testified, for the State, in rebuttal, that he knew the negro, George Washington, referred to by the previous witness. George Washington is dead, but was alive and testified upon the examining trial of the defendant. Washington was badly crippled at the time of the examining trial, and was barely able to walk. Witness saw the two bills of sale referred to by the witness Joe Mathews. He matched the two, to ascertain whether or not they were written on the same sheet of paper. One of the bills of sale was written on paper broader than that on which the other was written, and witness could not get the other two to match.

B. D. Dashiell testified, for the State, in rebuttal, that he examined and compared the two bills of sale referred to by the witness Joe Mathews. Those bills of sale were written on leaves that were evidently torn from an account book, as shown by the perpendicular red lines for the separation of debit and credit entries. The two would not match so as to show that they were written on the same make of paper. When they were placed together so as to extend the red lines from one to the other, the edge of one of the pieces of paper would extend beyond the

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other. A written instrument was here exhibited to the witness, and he identified it as the testimony of George Washington, deceased, taken before the examining trial of the defendant. That instrument was read in evidence, for the State, as follows:

"I live at Mr. Tom Tatum's. I have been there three months. I went there on the last day of March. I moved there from Mrs. Sallie Long's. I went to Mrs. Long's from near Centreville. My wife and Hannah Overall lived with me at Mrs. Long's. I was sick, and all the work was done by them. I worked only three days while at Mrs. Long's, one day for Rube Long and one for Mrs. Long. Hannah plowed two days for Mrs. Long. My wife worked two days for Mrs. Long. The four days work done by Hannah and my wife went towards house rent. As near as I can remember, I came to Mrs. Long's after Christmas. I moved my family about February 1, 1886, and moved to Mr. Tatum's on the last day of March, and afterwards made a contract to work on his crop. I know Mr. Joe Mathews when I see him. I first saw him at Mr. Tatum's, when Mr. Tatum was sick. That was on Sunday. I have seen James Mathews several times. I never saw Charles McDaniel until yesterday, to know him. I don't know where Joe Mathews lives, and was never there in my life. Until the day before yesterday, I never knew where Charles McDaniel lives. The last day of March, when I moved to Mr. Tatum's, was Wednesday. I don't remember what I did on Thursday, but on Friday I plowed for Mr. Tatum, beginning work at sun up. I went to Mr. Tatum's house to get the plow horse. I did not see Charles McDaniel, James Mathews nor Joe Mathews at any time on Friday. I did not go to Charles McDaniel's house, nor to Joe Mathews's house, on Thursday, April 1, nor did I go anywhere on that day except to Mr. Tatum's house. I don't remember what I did at Tatum's on that Thursday. I never sold any yearlings to James Mathews nor to Charles McDaniel, nor to either of them. I never owned a cow in my life. I never had a conversation with either Mathews or McDaniel about selling yearlings to them. I never got any yearlings from Mrs. Sallie Long, nor from anybody else, for work. I never owned any cattle in my life, and never sold any cattle for myself nor for anybody else. I can neither read nor write. I have never seen the papers called bills of sale, now shown me, before. I don't know what name is signed. I never authorized anybody to sign my name to any document, and

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know nothing of the yearlings described in the bills of sale, and I never saw them. My wife was at home, on Mr. Tatum's place, on Thursday and Friday, April 1 and 2, 1886. I know Cephas Burton. He lives on Mr. Tatum's place, in the house adjoining me. I don't know where Cephas was on Thursday, April 1, 1886, but he was with me all day on Friday, April 2, and until noon on Saturday, April 3. I plowed a sorrel horse, and he plowed a yoke of oxen. I was summoned to appear at this trial on Sunday, and came yesterday, Monday. I told Mr. Tatum that I was summoned to appear here, but that I knew nothing about the yearlings. He told me it was no use for me to come, and that he would attend to this matter for me. I had a conversation with Joe Mathews in Mr. Dodson's presence. Joe Mathews asked me if I signed the bill of sale, and I answered that I did not. Joe Mathews then called me a liar. I told Mr. Lindsey, when he summoned me, that I did not know anything about the case."

Cross examined: "I know what it is to be sworn in court, and I know the penalty. I know an almanac. I count from the first day of the month to the last. I simply know the date of the month because I know it. I can't read nor write. I commenced work by the month for Mr. Tatum on the first day of April. I worked for him two days before that. I can't remember what I did on Thursday, but on Friday I plowed on the other side of the branch. I worked for Mr. Tatum two days in March, but I do not remember the days. It was after dinner when I came away from Mr. Tatum's on Thursday. I did not go away from here when I left. I knew Joe Mathews when he came to Mrs. Tatum's, by hearing Mrs. Tatum say, when he came there and got off his horse: "There is Mr. Joe, Tatum." I don't know where Mr. Burton was on March 28, nor before, but I know where he was on the first and second days of April, because he plowed with me; that's the reason I know where he was. I swear positively that I was not at Joe Mathews's house on Thursday, April 1, 1886. I did not tell Joe Mathews in the presence of Mr. Yow (Dixon) to tell James Mathews and Charley McDaniel to come over, and that I had those yearlings. I swear that I did not sell four yearlings at Charles McDaniel's pen, and that I never spoke to Charles McDaniel in my life."

Cephas Burton testified, for the State, in rebuttal, that he and George Washington plowed together all day on the first and second days of April, 1886. Witness saw George Washington

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at intervals throughout both of those days. Washington was then somewhat crippled, and could not walk fast.

Coburn, Walker and Rankin testified, for the State, in rebuttal, that the land occupied by them was of the same character as the land occupied by Tatum. They knew that the ground was not too wet for plowing on either the first or second days of April, 1886, because they plowed their lands on both of those days.

Johnston & Dotson, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. A motion in arrest of judgment attacked the sufficiency of the indictment, because the minutes of the court do not show that a foreman for the grand jury which found the bill had ever been appointed by the court, nor do they show that the said grand jury were ever sworn.

"A motion in arrest of judgment shall be granted upon any ground which would be good upon exceptions to an indictment or information for any substantial defect therein." (Code Crim. Proc., art. 787.)

Exceptions, and the only exceptions, to the substance of an indictment in our practice are those enumerated in article 528 of the Code of Criminal Procedure, and all exceptions to form are specified in article 529. No such grounds as those here asserted are enumerated in the matters rendering an indictment defective for substance; they are matters of form only. "A mere formal objection would not be reached by a motion in arrest of judgment." (*West v. The State*, 6 Texas Ct. App., 485; *Ferguson v. The State*, Id., 504; *Bailey v. The State*, 11 Texas Ct. App., 140; *Niland v. The State*, 19 Texas Ct. App., 167; *Williams v. The State*, Id., 277; *Weaver v. The State*, Id., 547; *Williams v. The State*, 20 Texas Ct. App., 357.) It was not error to overrule the motion.

The only defense interposed at the trial was that the defendant had purchased the animal alleged to have been stolen, from one George Washington. Joe Mathews, a brother-in-law of defendant, testified positively to the sale by and purchase from Washington, and that he had witnessed the bill of sale. However improbable this testimony may appear in the light of the other evidence in the case, it was, nevertheless, evidence in the case, and

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it presented an issue which it was the province of the jury alone to pass upon.

In his charge the learned special judge who presided did not submit the question of a purchase *vel non* to the jury. It is insufficient in this regard. (Ray v. The State, 13 Texas Ct. App., 51; Murphy v. The State, 17 Texas Ct. App., 645; Ryan v. The State, 22 Texas Ct. App., 699.) "If there is any evidence tending, though slightly, to establish a defense, the defendant is entitled to a charge directly upon that point, no matter what view the court may entertain of the weight and value of the testimony." (Scott v. The State, 10 Texas Ct. App., 112.)

Because the court failed to charge the law applicable to the defense made, the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered January 28, 1888.

No. 2321.

CHILIS BANKS v. THE STATE.

1. **MURDER—INDICTMENT** is sufficient to charge a murder by express malice aforethought, and, therefore, murder of the first degree, if it charges that the accused "did, with malice aforethought, kill the deceased [naming him] by shooting him with a pistol."
2. **PRACTICE IN THE COURT OF APPEALS—STATEMENT OF FACTS—BILL OF EXCEPTIONS.**—In the absence of a statement of facts and bills of exception, this court is called upon to review the record on appeal only with reference to the sufficiency of the indictment and the correctness of the charge of the court.

APPEAL from the District Court of Chambers. Tried below before the Hon. E. Hobby.

The death penalty was assessed against the appellant in this case for the murder of Martha Henderson. The transcript brings up neither a statement of the facts proved on the trial, nor bills of exception reserved during the proceedings.

William Chambers, for the appellant.

24	559
28	128
24	559
31	364

Opinion of the court.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. For the murder of Martha Henderson, the appellant, Chilis Banks, was tried and convicted of murder of the first degree, with the death penalty awarded against him.

In arrest of the judgment, the following motion was presented and overruled: "That the indictment is fatally defective in this, that it does not charge that defendant killed and murdered Martha Henderson." The indictment alleges that defendant "did with malice aforethought kill Martha Henderson by shooting her with a pistol." It is the settled doctrine of this court that to allege that the killing was with "malice aforethought," is equivalent to alleging that the homicide was committed with express "malice aforethought."

This being the case, this indictment in legal effect charges that defendant did, with express malice aforethought, kill Martha Henderson by shooting her with a pistol. The question raised and insisted upon by the appellant is, that it must be alleged that the accused did "murder" the deceased. We hold it sufficient in this respect if the acts, elements and intentions which compose the offense are set forth in plain and intelligible language. Hence, conclusions from the acts and intentions need not be alleged. Applying this rule to the indictment under discussion, it will be found amply sufficient. Why? Because it is impossible for a person to shoot and kill, with his express malice, a human being, and not be guilty of murder of the first degree. (Willson's Crim. Forms, 388, and notes.)

The record contains neither a statement of the facts nor a bill of exceptions; nor have we the aid of a brief for the appellant. Then there is nothing to be revised by this court except the sufficiency of the indictment and the charge of the court. The indictment is good, and, in the absence of a statement of facts, we find no error in the charge requiring the reversal of the judgment.

The judgment is affirmed.

Affirmed.

Opinion delivered January 23, 1888.

Opinion of the court.

No. 2453.

24 561
28 363

EX PARTE S. L. DAMPIER.

HABEAS CORPUS—COUNTY CONVICTS—STATUTES CONSTRUED.—The act of May 4, 1882, and that of March 1, 1887, all amendatory of Article 3602 of the Revised Statutes, which relates exclusively to the *hiring out* of county convicts, in no manner affect Article 3597 of the Revised Statutes, which has never been repealed nor changed in any respect. Under the provisions of the last named article, a county convict, against whom a fine and costs have been adjudged, and who, in default of the payment of the same, has been put to labor on the county farm, is entitled to receive a credit against his fine and costs of one dollar per day for each day that he labors; and, when he has labored on the county farm a sufficient length of time to satisfy fine and costs, at the rate of one dollar per day, he is entitled to his discharge.

HABEAS CORPUS on appeal from the County Court of Milam. Tried below before the Hon. E. Y. Terral, County Judge.

It was shown upon the hearing of the writ in the court below that, to an information charging him with petit theft, the relator pleaded guilty, and that a fine of one dollar and costs, and confinement for one hour in the county jail was assessed against him as punishment. Upon his failure to pay the fine and costs, which amounted to the sum of thirty-two dollars and ten cents, the relator, by the order of the court, was placed at labor on the county farm. He had labored on that farm for forty days when he sought his discharge under the writ of habeas corpus. The writ was awarded, but, upon the hearing of the same, the trial judge refused, in default of the payment of the fine and costs, to discharge the relator.

T. S. Henderson, for the relator.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. There is but one question presented for our decision in this case. It is as follows: When a county convict has worked on a county farm a sufficient number of days to discharge the fine and costs adjudged against him, at the rate of one dollar per day, is he entitled to be discharged from fur-

Syllabus.

ther confinement? We are of the opinion that this question must be answered in the affirmative. Article 3597 of the Revised Statutes provides: "When a convict who has been committed to jail, in default of payment of fine and costs, is required to do manual labor, he shall be credited upon such fine and costs at the rate of one dollar for each day he may labor; and upon satisfaction of such fine and costs in full, at said rate, he shall be discharged."

The above quoted article has never been repealed or in any respect changed. It is in no manner affected by the act of May 4, 1882 (17th Leg., called session, p. 16), nor by act of March 1, 1887 (20th Leg., p. 11.) These acts are amendatory of article 3602 of the Revised Statutes, which article and said amendatory acts relate exclusively to the *hiring out* of county convicts, and have no application whatever to the case of a convict who has been required to work upon a county farm or upon the public roads.

In this case, the convict has worked upon the county farm for a sufficient length of time to satisfy in full the amount of the fine and costs adjudged against him, at the rate of one dollar for each day he has labored, and he is entitled to be discharged from further confinement under said conviction.

The judgment of the county judge, refusing to discharge him, is set aside, and it is ordered that A. J. Lewis, sheriff of Milam county, respondent herein, forthwith release and discharge the applicant from further custody and confinement under and by virtue of said conviction, and that said respondent pay the costs of this proceeding.

Ordered accordingly.

Opinion delivered January 28, 1888.

24	562
28	315
24	532
33	343

No. 2405.

ARTHUR CARR v. THE STATE.

1. PRACTICE—NON-AGE—BURDEN OF PROOF.—Proof of the non-age of the accused at the time of the commission of the offense, imposes upon the State the burden of proving that when he committed the offense, if he did commit it, he understood the nature and illegality of the act. This

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proof is not sufficiently made if the State merely shows that he knew the difference between good and evil, or that he was possessed of the intelligence of ordinary boys of his age. On the contrary, it must be affirmatively shown that he had sufficient discretion to understand the nature and illegality of the particular act constituting the crime.

2. **SAME—CIRCUMSTANTIAL EVIDENCE.**—It is not necessary that the proof of discretion should be made by positive evidence. In many cases, circumstances of education, habits of life, general character, moral and religious training, and, oftentimes, the circumstances connected with the offense will be sufficient to satisfy the jury that the accused had the discretion required to render him responsible for the crime.
3. **SAME—EVIDENCE—EXPERT TESTIMONY.**—One of the exceptions to the general rule that a witness can speak only as to facts, and will not be permitted to express his belief or opinion, is that, when the issue is as to the sanity of a person, even the non-expert witness may state his opinion and conclusion upon the facts to which he has testified. This rule will comprehend the inquiry as to whether or not, on account of non-age, the accused had sufficient discretion to understand the nature and illegality of the acts constituting the crime charged against him; and the witness, having stated the facts upon which he based his opinion, may state his opinion as to the discretion of the accused. See the opinion on the question.
4. **SAME—CHARGE OF THE COURT.**—The refusal by the trial court to give a requested instruction in charge to the jury is not error if the general charge comprehended clearly the law applicable to the case.
5. **SAME—CONFESSIONS.**—See the statement of the case for circumstances under which it is *held* that the confession of the accused was properly admitted in evidence against him.
6. **SAME—CIRCUMSTANTIAL EVIDENCE—CHARGE OF THE COURT.**—It is not incumbent upon the trial court to give in charge to the jury the law applicable to circumstantial evidence, unless the State, in seeking a conviction, relies wholly upon that character of evidence. Note that this rule, in view of the confession of the accused, applies to this case.
7. **SAME.**—The credibility of the witnesses and the weight of the evidence are questions addressed to the trial jury alone. In passing upon the truth of a confession, a part of which has been contradicted by other evidence, it is within the power of the jury to accept one portion of the confession as true, and to reject as untrue that which has been contradicted by other testimony. See this case in illustration.
8. **BURGLARY—FACT CASE.**—See the statement of the case for evidence *held* sufficient to support a conviction for burglary.

APPEAL from the District Court of Red River. Tried below before the Hon. D. H. Scott.

The conviction in this case was for the nocturnal burglary of the house of Gough & Smith, in Red River county, Texas, on September 10, 1887. The penalty assessed against the appellant was a term of two years in the penitentiary.

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Joe F. Smith was the first witness for the State. He testified that he was the junior member of the firm of Gough & Smith, who were retail grocers, doing business in the town of Clarksville, Red River county, Texas. Witness's partner's name was William C. Gough. The witness had known the defendant about one year. The store house of Gough & Smith, to the knowledge of the witness, was burglariously entered at night as often as three times during the month of September, 1887. Entrance was effected on each of those occasions through the up stairs window, just above the awning which faced the public square of the said town of Clarksville. One of the glass panes of that window was so broken that a person could insert an arm and remove the fastening apparatus of the window frame. To get to the window described, a person would have to mount the stairs leading from a public street to an adjoining building, and thence pass through a window or door in that building to the awning. There were no outside stairway or steps attached to the Gough & Smith store building. After the first burglary in September, the witness missed between fifty and seventy-five cigars and some snuff, from their stock; after the second he missed some flour, and after the third he missed some money from the cash drawer. Witness had often seen the defendant and one John Reddick, another colored boy, together about town. Reddick worked about and in the store which adjoined Gough & Smith's store. Defendant was an exceedingly bright boy of his age and race. He could write a good hand, and witness was satisfied that he knew right from wrong. Witness was confident that defendant was possessed of sufficient discretion to know that it was wrong and illegal to break into and steal from a house. Witness had never seen the defendant in Gough & Smith's store house at night, and had no other than a casual acquaintance with him. He had never had any business transactions with defendant, and knew him only well enough to observe that he was a very bright minded negro boy. Witness would suppose that defendant was between thirteen and fourteen years of age. On the morning of September 24, 1887, S. B. Donoho told witness that he saw some person in the witness's store on the night before. Witness had no one clerking in his store during the month of September, 1887. The witness carefully locked the openings to his store on the night that Donoho claimed to have seen some one in that building. Gough & Smith's losses in money, during the month of September, 1887, amounted to twenty

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dollars. The goods and money taken from that store on the occasions mentioned belonged to witness and Gough, and were taken without the consent of the witness. The witness did not consent for defendant or any one else to enter the store house on either of the occasions referred to by him. Having once passed through the window over the awning, a person would have access to every part of Gough & Smith's store.

W. C. Gough, the senior member of the firm of Gough & Smith, testified, for the State, substantially as did the witness Smith. He declared that the store house, on each of these occasions referred to, was entered by some one without his knowledge or consent, and that the house was always carefully closed and locked at the close of business on each day. He had known the defendant well for several years, and would estimate his age as between thirteen and fourteen years. He regarded him as a remarkably bright colored boy, and was satisfied that he knew right from wrong, and knew that it was a wrong and illegal act, and a punishable crime to break and enter into, and steal from a house. On the morning of September 25, 1887, S. B. Donoho told witness that he saw a little negro boy in witness's house on the night before. Upon examining the store witness found several match stumps scattered over the floor.

S. B. Donoho testified, for the State, that he had known the defendant and another negro boy named John Reddick about a year and a half. When the witness was passing Gough & Smith's store, in Clarksville, on the night of September 23, 1887, his attention was attracted by a light in that store, the door of which was closed. He stopped between two and three feet from the door, to watch. Within a few minutes he saw John Reddick pass from behind a lot of boxes, some twenty feet from the door. He held a lighted match in his hand, which he blew out on getting clear of the boxes. He was followed by another boy of about the defendant's size and color, whom the witness failed to recognize. It was then not later than eight o'clock, and several stores on the square were still open. On the next morning the witness notified both Gough and Smith of what he saw on the said night. In passing from the door or window of the building adjoining Gough & Smith's store, and across the awning to the window in Gough & Smith's store, a person would be in very plain view, and would be readily seen by passers by.

J. D. Barry testified, for the State, that he was the senior member of the firm of Barry, Love & Co., whose store adjoined that

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of Gough & Smith on the east. A stairway led from the street to the second story of witness's building. By mounting those steps and going into and through Doctor Dinwiddie's office, a person could gain access to the awning over Gough & Smith's store. That awning was immediately underneath the window with a broken pane described by the witnesses Gough and Smith. Witness knew the defendant, and considered him a very bright, intelligent negro boy, of between thirteen and fourteen years of age. He associated with a negro boy named John Reddick, whom, during the month of September, 1887, the witness had working about his store. All that time the witness had in his employ as porter a negro man named Andy Goodin.

Sam Stanley testified, for the State, that about dusk, one evening in September, 1887, subsequent to the twenty-third, he saw defendant and John Reddick standing on the sidewalk in front of Gough & Smith's store, and, as he passed them to go up the stairway, he heard one of them say to the other: "Boy, what made you wear them shoes to-night?" Gough & Smith's store was not then closed. Defendant and Reddick were negro boys of near the same age, and both were very intelligent for their age and race. Witness considered them intelligent enough to know the wrong and illegality of breaking into and robbing a store.

The matter involved in the fifth head note of this report refers to the testimony of G. F. Whitlow, who was the next witness for the State. He testified as follows: "I am the city marshal of Clarksville. I have known the defendant for about a year. After the arrest of the defendant and after his release, upon bond, his brother came to and requested me to go to their mother's house and see if I could not get the defendant to tell what man put 'them' up to the burglary, as he, the defendant's brother, was satisfied that some man was at the bottom of the affair. I went to the house of the defendant's mother and had a talk with the defendant. My official position was known to him, and I told him that it might be best for him to tell all about it, and that if he did tell all he knew about the burglary he might be permitted to turn State's evidence. I do not remember whether or not I told him that he would or would not be prosecuted, but I think I told him that it 'might be best for him to tell all, and that he might escape by doing so.' The defendant then told me that on the night he went into Gough & Smith's store, Andy Goodin, Barry, Love & Co.'s negro porter, caught him on the street, covered him with a pistol, and told him that if he did not

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go through the window and open the door that he, Goodin, would blow his brains out; that Goodin made him go through the window and open the door; that Goodin then went into the store and made him climb to the top of a stack of flour and hand him down two sacks of what he said was the best flour, and that Goodin then took some cigars and snuff. He said that Goodin and he went into the said store twice."

W. H. Dickson testified, for the State, that the defendant was the posthumous child of an old negro who, in slave times, belonged to him, witness. That old negro died in May, 1875, and the defendant was born in the following August, and was consequently, at the time of this trial, December, 1887, but little above twelve years of age. He was a negro boy of average intelligence.

A. P. Gray testified, for the State, that the defendant personally signed his appearance bond, and that the signature showed a good handwriting.

The State rested.

Angie Carr, the mother of the defendant, testified, in his behalf, that he was born in August, 1875, and was, therefore, but little past twelve years of age at the time of this trial. His mental capacity was inferior to that of ordinary boys of his own age and race. He had attended school and could read and write, and witness, though she had tried, had never been able to teach him to do right and read his bible.

The defense closed.

Andy Goodin testified, for the State, that he was employed as porter in the store of Barry, Love & Co. until John Reddick was caught in "their" store. He had not been in that employment since. Witness knew nothing whatever of the defendant going into the store of Barry, Love & Co. or that of Gough & Smith, or that of anybody else, nor had he ever asked or forced or procured the defendant to go into anybody's store.

The motion for new trial raised the questions discussed in the opinion.

Sims & Wright, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. At the time of the commission of the offense, the evidence shows that the defendant was over nine but under thirteen years of age. His non age being established, the

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burden devolved upon the State, in order to subject him to punishment, to prove that at the time he committed the offense, if he did commit it, he understood the nature and illegality of the act. Proof that he knew the difference between good and evil, or that he was possessed of the intelligence of ordinary boys of his age, does not fill the requirements of the law. It must be shown that he had sufficient discretion to understand the nature and illegality of the particular act constituting the crime.

It is not required that proof of discretion should be made by direct and positive testimony. In most instances, circumstances of education, habits of life, general character, moral and religious instructions, and often times the circumstances connected with the offense charged, will be sufficient to satisfy the jury that the defendant had the discretion required to render him responsible for the crime. (Willson's Texas Crim. Laws, secs. 71, 72, 73, 74.)

On the trial of this case the court, over the objections of the defendant, permitted several witnesses to state their *opinions* as to the discretion of the defendant, and these rulings of the court are presented for revision by proper bill of exception, and insisted upon as error. The precise question thus presented has never been directly adjudicated by the courts of last resort in this State. A familiar general rule of evidence is that witnesses can only speak as to facts, and can not be permitted to state their belief or opinions. But to this general rule there are well settled exceptions, one of which is that where the issue is as to the sanity of a person, even witnesses who are not experts are permitted to state their opinions and conclusions upon the facts to which they testify. (Willson's Texas Crim. Laws, sec. 87. See also as to other exceptions, *Cooper v. The State*, 23 Texas, 331; *Whart. Crim. Ev.*, secs. 459, 460; *Roscoe's Crim. Ev.*, 7 ed., pp. 143, 144.)

Should the exception which applies where the issue is sanity apply in this case? We can see no good reason why it should not. In the two cases the inquiry is substantially the same—that is, the mental status of the defendant at the time of the commission of the act. The two issues are analogous, if not precisely the same, and it seems to us that evidence which is competent upon the one should be held competent upon the other. We hold, therefore, that it was not error to permit the witnesses to state their opinions that the defendant, at the time of the commission of the burglary, had sufficient discretion to

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understand the nature and illegality of the acts constituting that crime, said witnesses having stated the facts upon which their opinions were based; that is, their acquaintance with the defendant; that he was a bright boy, could read and write, etc. As to the weight to be given to these opinions, that was a matter for the jury to consider and determine, and does not relate to the admissibility of the opinions as evidence.

With respect to the charge of the court upon the issue of the defendant's discretion, it is in our opinion correct, and presents the defense of infancy affirmatively and clearly. It was not error, therefore, to refuse to give the special instruction requested by the defendant's counsel, upon said issue.

As to the admissibility of the defendant's confession, we think there can be no doubt. He was properly cautioned, before making the confession, that it could be used against him. It was not made under the influence of fear, or of any positive promise of a benefit to be gained by him by making it. Under the rules now governing the admissibility of confessions, we do not think the court erred in admitting the confession. (*Rice v. The State*, 22 Texas Ct. App., 654; *Thompson v. The State*, 19 Texas Ct. App., 595.)

That portion of the defendant's confession which stated that in burglarizing the house he acted under compulsion of another party was contradicted by the testimony of the party named. It was for the jury to determine the credibility and weight of the evidence, and in doing so it was within their province to believe one portion of the confession to be true, and to reject as untrue another portion which had been contradicted by other testimony adduced.

Defendant having confessed that he entered the house with intent to commit theft therefrom, the case is not one in which the conviction was sought or wholly founded upon circumstantial evidence, and it was not necessary, therefore, that the court should instruct the jury with regard to circumstantial evidence.

We have given this case a careful consideration, and we find no reversible error disclosed in the record. While the evidence of defendant's guilt can not be said to be entirely free from suspicion and doubt, still it must be regarded as legally sufficient to support the conviction. The judgment is therefore affirmed.

Affirmed.

Opinion delivered January 28, 1888.

Syllabus.

No. 2434.

JAMES BOYD v. THE STATE.

1. **THEFT—POSSESSION OF RECENTLY STOLEN PROPERTY—EVIDENCE—CHARGE OF THE COURT.**—Possession of recently stolen property is not positive evidence of theft. At most, it is but a circumstance tending to establish theft. A case, therefore, depending alone upon the possession of recently stolen property is a case resting alone upon circumstantial evidence, and in such case the omission of the trial court to charge the jury upon the law of circumstantial evidence is material error. Note the opinion for a state of proof to which the rule applies.
2. **SAME—PRESUMPTIONS.**—The general rule obtains that if a party, in whose exclusive possession property recently stolen is found, fails reasonably to account for his possession when called upon to explain, or when the facts are such as to require of him an explanation, the presumption of guilt arising from recent loss and possession will warrant a conviction without further proof. In such case, however, it is for the jury, under proper instructions, to determine the question of recent possession; and they should be explicitly charged that, unless they found such possession was recent, they would indulge no presumption of defendant's guilt because of his being found in possession of the property. The failure of the trial court, under the proof in this case, to charge the jury upon this doctrine, and its refusal to give the special instruction upon the same, was material error.
3. **SAME.**—In order to warrant a conviction for theft, it devolves upon the State to show by affirmative proof the defendant's participation in or connection with the original taking of the property. If the proof merely connects the defendant with the property subsequent to its actual taking, it will not authorize a conviction for theft, however manifest it may make his guilt of another offense. See the opinion for a statement of the rule on the doctrine.
4. **SAME—CHARGE OF THE COURT.**—Upon the proof in this case, which failed to show the defendant's connection with the original taking of the stolen property, but tended to establish his subsequent connection with the same, with the knowledge that it was stolen, the defense requested the trial court to charge the jury as follows: "Before the jury can convict the defendant, they must believe beyond a reasonable doubt that he is guilty of the original fraudulent taking, and any subsequent connection after the taking would not be theft, either in good or bad faith; and, if the jury believe the defendant purchased the cow from *Mixon*, or any other party, after the fraudulent taking, either in good or bad faith, he is not guilty of theft." *Held*, that under the rule announced, and under the proof stated, the refusal of the requested charge was error.

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5. SAME—ACCOMPLICE TESTIMONY, to be sufficient, must be corroborated by other evidence, showing not merely the commission of the offense charged, but that the defendant committed or participated in its commission. Moreover, to be sufficient, such corroboration must include the material or main issue on the trial; the main issue in this case being the original taking of the stolen property. See the statement of the case for a charge of the court upon the subject, *held* insufficient.

APPEAL from the District Court of Jones. Tried below before the Hon. J. V. Cockrell.

The indictment in this case charged the appellant and W. E. Willis jointly with the theft of a cow, the property of W. T. Wright, in Jones county, Texas, on the first day of August, 1887. A severance being awarded, the appellant was placed upon his trial, which resulted in conviction, and the assessment against him of a term of four years in the penitentiary.

W. T. Wright was the first witness for the State. He testified, in substance, that he was a resident of Taylor county. The cattle owned by the witness ranged in said Taylor county, on Elm creek, about one and a half miles west from the town of Abilene. The brand of the witness was AP on the right hip. That brand appeared on the left hip of some of his cows. The cow described in this indictment belonged to the witness. He milked her during the two seasons preceding her disappearance from the range, and knew her well by the brand and by flesh marks. He last saw this cow on his range about three months before he recovered her from the possession of the sheriff of Jones county. Meanwhile witness's brand on the cow had been barred out,—that is, a bar had been branded through and across the brand proper,—and a fresh brand, a reversed 4 and H connected, placed on the left side. Her ears had also been cut off. Witness knew nothing about the taking of his said cow. He had no knowledge of her absence from the range until he found her in Jones county, among a number of cattle in the possession of the sheriff. She was not taken from the range and the possession of witness with his knowledge or consent.

Will Mixon was the next witness for the State. He testified, in substance, that he was a tenant on the defendant's place in Jones county, and occupied a house about two miles distant from the residence of the defendant. Witness was at the defendant's home place about two weeks prior to this trial, at which time a number of cattle were branded. The branding of the said cattle

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was done on Sunday evening. Will Willis, Lem Baker, defendant and witness were the parties present. The defendant's wife and Miss Edwards came to witness's house on that Sunday morning, and Mrs. Boyd told witness that her husband wanted him to go to his house and help him brand some cattle. Witness objected that the weather was too hot to go, and that he had no saddle on which to ride. Mrs. Boyd replied that witness could get a saddle at Boyd's on which to ride back. Witness then agreed to go, and went. On his arrival at defendant's place he found a number of cattle in the pen, but no person was then there. Within a few minutes, however, Willis rode up to the pen, and asked witness: "What are those cattle doing here?" Boyd and Baker arrived at the pen a few minutes later, and a discussion about the branding of the cattle ensued. Willis put an end to the discussion by exclaiming: "If you are going to brand them, let's go at it." The parties named then proceeded to brand the animals. Boyd directed witness to rope a steer, which witness did, and it was branded. Four or five others were roped and branded in like manner, Willis using the irons. Among the animals branded was the cow described in the indictment. A bar was first burned through her original brand AP, and a reversed 4 and H connected were branded on her left side. Baker, on examining the brand of one of the cows after it was thrown down, that brand being $\overline{4}$ IP, exclaimed: "This cow has been monkeyed with." Willis replied: "I will fix her," and thereupon he changed the first letter, the witness thought, to a reversed B, and the last letter to R. He then burned a bar through the brand as changed. The brand on a certain steer, which was POP, was changed by the defendant himself to ROB, and a bar was then burned by him through the ROB.

While the several animals were being branded, as stated by the witness, Dan Henson came to the pen, and almost immediately the parties named went from the pen to Boyd's house. As soon as he saw Henson coming, Boyd told the parties to go to the house and get some water. He then told Henson, who was walking, that he had better take his, Henson's, mare to water; that she had not been to water since she was turned loose at the pasture gate two days before. When Henson went off, ostensibly to take his mare to water, the several named parties returned to the pen and resumed the work of branding the animals. Some time later, while the branding was still going on, Mrs. Boyd and Miss Edwards came to the pen in a hack, and Henson came

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back to the pen about the same time. Boyd requested Henson to take the horses from the hack; which Henson did. Boyd then told Henson to take one of the horses and hunt his mare, which he had failed to find before. Henson took the horse and rode off in quest of his mare. Witness knew that a steer was tied down while Henson was at the pen, but he could not say whether it was branded in Henson's presence or not. Henson, however, at various stages of the branding, could have seen what was going on. After the branding of the animals, Boyd told witness that he was going to remove the cattle to Baker's pasture on the morrow, and asked witness to come early to the house and help him. The witness started to Boyd's about daylight on the next morning, and met Boyd and Baker driving the cattle towards Baker's pasture. Willis was not with them, nor did witness see him on that day—the day after the branding. Witness went on with Boyd, Baker and the cattle. They passed Deshazo's place about sun rise, and witness then saw Mr. Deshazo at his cow pen, and knew that Deshazo saw them. Boyd asked the question: "Do you think that man will know us again?" Witness replied: "I guess so; he looked at us straight enough." Witness drove the cattle, with Boyd and Baker, through the Cockrell and Pumphrey pastures to Sand Hollow, where, at about eleven o'clock, he turned back and went home. While in the Pumphrey pasture, Baker went from the cattle to Pumphrey's ranch. He had not returned when witness left the cattle, but shortly afterwards the witness turned back and saw Baker and Lewis Harrington driving some cattle. Witness then delivered to Baker a message from Boyd to hurry to the bunch he was driving. On his way home, and at about twelve o'clock, the witness met Deshazo at Mr. Tom's place, and ate a watermelon with him. On the second Sunday preceding this trial the witness went to Baker's pasture as the bearer of a note from Mrs. Boyd, defendant's wife, to Baker, telling him, Baker, that Boyd and Willis had been arrested for the theft of the cattle, and for him, Baker, to keep his mouth shut. The ear marks on several of the animals branded as stated by witness were changed, but witness could not say in what manner.

On his cross examination, witness stated that but four or five head of cattle were branded in Boyd's pen on the Sunday evening referred to by him. He did not know when the remaining animals of the bunch were put in the "4H," connected, brand. Witness had been "dodging around" during the four or five weeks

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immediately preceding this trial. Part of that time he spent in Shackelford county, part of it on Dead Man's creek, in Jones county, and part of it in Taylor county. On the Wednesday succeeding his release from jail the defendant came to the witness's house and told witness that he and Willis were in a hard hole about those cattle, and asked witness if he would help him get out of it. Witness assured him that he would do all that he could legitimately do to help him. He then asked witness to give him a bill of sale, conveying to him cattle in the 4 connected H brand, which the witness refused to do. Defendant then said that witness would regret his refusal as long as he lived. Witness then started to town with a load of watermelons. Boyd accompanied him as far as his (Boyd's) house, urging him to execute the bill of sale. He offered, as inducement, his best horse and twenty-five dollars in money, for witness to execute the bill of sale. He then said that if witness did not want to leave his family, the witness could take his, Boyd's, wagon and the best pair of his horses, to remove them, and that he would not exhibit the bill of sale until the latter part of the week. He urged that if witness would keep out of the way, he and Willis could get their cases continued. Dan Henson got on witness's wagon at Boyd's house, and Boyd concluded to go to Abilene with them. Witness spoke of the case once or twice en route to town, when Boyd punched him to be silent. Dan Henson did not return home with witness and Boyd from Abilene. The witness's purpose in "dodging around" was to avoid being called to testify against defendant and Willis. On the Saturday night preceding this trial, while witness was riding on Dead Man's creek, he met a man whom he took to be Lige Carter, but was not certain of his identity. That man asked if witness's name was not Mixon. Witness replied in the affirmative, and the man asked where he was going. Witness replied that his destination was his own business. The man then said, significantly, that if witness wanted to preserve his health he had better leave the country. It was then dark, and witness was off the road. He could not, therefore, be certain that the man was Carter, but he took him to be. Witness, having heard that his life was in danger, determined, upon the strength of this episode, to go to Anson and find out what he could. He was captured at the "Shinnery" on the night before this trial by Sheriff Scarborough. He did not know how Scarborough had ascertained his whereabouts, but witness had never sent him word that he wanted to surrender. Witness

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did not steal any of the cattle, nor did he know anything about the theft of the cattle that were branded in Boyd's pen. The witness thought that there might be something wrong about the cattle, but subsequently helped drive them to pasture, because Boyd asked him to. Witness denied that he ever sold Boyd any cattle. He bought a horse from Boyd during the winter preceding this trial, for which he paid him forty dollars.

Re-examined by the State, the witness admitted that in stating on his cross examination that he was arrested on the previous night at the "Shinnery" by Scarborough, he told an untruth. As a matter of fact he was captured in the brush, about half a mile from the "Shinnery" and about the same distance from the court house. His object in telling this untruth in the first instance, was that he did not want his reason for coming to court to be known. Witness came to court because Boyd had threatened him and told him that he would always regret refusing to help in the manner desired by Boyd, and because his, witness's, life had been threatened, and because witness had heard that an effort would be made by Boyd and Willis to escape by fastening the theft of the animals upon him, witness. Witness went on the "dodge" at the request of Boyd, and to enable Boyd and Willis to get their cases continued.

On his re-cross examination, the witness said that he never heard Willis claim any of the cattle that were in Boyd's pen. Willis merely helped to brand the animals, just as witness did. Boyd appeared to control and exercise authority over the cattle. The cattle were in Boyd's pen when witness first saw them. No one was at Boyd's pen when witness first arrived, but Willis reached there soon afterwards, being then on his return from Anson. Witness denied that he told Dan Henson about five weeks before this trial, at a point between his, witness's, and Boyd's houses, that he, witness, had recently purchased a horse from Boyd and Willis, paying them in trade and cattle to the amount of forty dollars. Witness never at any time, traded or sold any cattle to either Boyd or Willis. He bought the horse from Willis, and was to pay for him in the fall of 1887. He did not give his note for the purchase money, nor did he get a bill of sale from Willis. Witness was at Deshazo's camp in July, riding the horse he got from Willis. He did not think he then told Deshazo that he got the horse from Dave Harrington. The witness denied that, on the evening after the cattle were seized in Baker's pasture by the sheriff, he told either Dave or J. L.

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Harrington that he had come to get the cattle, and that he was afraid he would be dragged into the trouble about them. He denied that he told the Harringtons that he had proposed to Boyd and Willis to go with him to Baird, Albany or Cisco, or anywhere else, where he was not known, for the purpose of enabling him to fabricate a bill of sale to cover the cattle. Witness had no part in the theft of the cattle, nor did he ever tell the Harringtons that he put certain of the cattle in the pasture, and directed Willis to trade them for the horse in his behalf. Witness went to the house of Judge Cockrell on the Friday night to see the district attorney, his purpose being to ascertain whether or not he had been indicted, as he had heard he would be. He told the judge and district attorney the matters he had now testified to. The district attorney made no promise of any kind to witness, but told him to keep out of the way until Monday morning, and then to bring one Forsythe to the court house, if he could. The judge said that he thought the witness had been indicted. Witness did not borrow a gun from Judge Cockrell, but Fred Cockrell, who was with witness, got a gun.

Dan Henson was the next witness for the State. He testified that he went to Boyd's house on the evening of Saturday, September 6, 1887, his destination being the pasture in which he had placed his mare. On Boyd's gallery he found Boyd, Baker, Willis and Mixon. After some talk Boyd told witness that he had better look after his mare and take her to water. Witness went off and looked for his mare. Failing to find her, he returned to the house and found Boyd in the horse lot. Mrs. Boyd and Miss Edwards had just driven up in a hack. Boyd directed witness to take the horses from the hack, and to ride one of them in search of his mare. Witness did so, and found his animal. While he was unhitching Boyd's horses from the hack the witness saw some cattle in the pen, but he did not see any of them branded. He observed, however, that a steer was lying on the ground, tied with a rope which was held by Mixon. This all occurred on Saturday evening. Witness went with Mixon to Boyd's next day, and was with Willis all day and until late in the evening. He did not see either Boyd, Baker or Mixon on that Sunday. Witness went with Mixon and Boyd to Abilene on the Wednesday succeeding Boyd's release from jail. He did not hear anything said by either Boyd or Mixon about this case. Witness did not go back from Abilene in Mixon's wagon. Witness had a conversation with Mixon about five weeks before this

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trial, on the public road between the houses of **Mixon** and **Boyd**, when **Mixon** told him that he bought a horse from **Boyd** and **Willis**, for which he was to pay them forty dollars in trade and cattle.

Miss Willie Edwards testified, for the State, that she lived in **Abilene**, **Taylor county**, **Texas**. She visited the family of the defendant, in **Jones county**, about the time of the offense alleged in the indictment. About one o'clock on the Saturday evening preceding this trial, witness and **Mrs. Boyd** drove to the house of the State witness **Mixon**, when **Mrs. Boyd** told **Mixon** that the defendant wanted him to come to his pen at once to help about some cattle. **Mixon** said that he had loaned his saddle to a young man, and that he could not go without riding bare back. **Mrs. Boyd** repeated that **Mr. Boyd** particularly needed him, and **Mixon** agreed to go, and started off towards **Boyd's** house. Witness and **Mrs. Boyd** then went to a point on the river, and thence to **Boyd's** house. On their arrival at the latter place, the hack was stopped at the pen, in which there were some cattle, and near which there were some gentlemen. Witness went to the house from the pen. No person was at the house when the witness reached it. No branding was done in the pen on Sunday. Witness did not see **Mr. Willis** at **Boyd's** house on Sunday, until supper.

J. L. Harrington was the next witness for the State. He testified that he helped **Boyd** and **Baker** drive twelve head of cattle to the **Baker** pasture. He got with **Boyd** and **Baker** near **Pumphrey's** pasture. **Baker** found witness at **Pumphrey's** ranch, whence they drove one of **Baker's** cattle, and one of **Dave Harrington's**, to the bunch in possession of **Boyd**. The cattle driven by **Boyd** were fresh branded. En route to the **Boyd** bunch from **Pumphrey's** ranch, witness and **Baker** met a man whom witness did not know. Witness did not hear **Boyd**, at any time, say who owned the cattle, but heard him tell **Baker** that he (**Baker**) would get pay for the pasturage. Witness afterwards saw the cattle which the **Scarboroughs** got out of **Baker's** pasture, and recognized them as the cattle he had helped **Boyd** and **Baker** take to that pasture. One evening subsequent to the day that the cattle were taken from the pasture by the officers, the State's witness **Mixon** came to **Dave Harrington's** house, and asked about the cattle—which, he said, he wanted to get. He said that **Boyd** and **Willis** had been arrested for the theft of the animals, and he was afraid that he would be involved in the trouble about

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them. He said something, which witness could not recall, about going off and fixing up a bill of sale to cover the cattle. Dave Harrington was present.

W. E. Deshazo testified, for the State, that he lived on Clear creek, in Jones county, Texas, about three miles west from James Boyd. On Sunday, about two weeks prior to this trial, Boyd and Mixon passed the witness's house, driving a small bunch of cattle. It was then about sun rise, and they were driving the cattle in a long trot. At that time the witness, with his horse, was standing near his yard gate. Mixon was at witness's camp on the sixth day of July, and was then riding a horse which he said he got from Dave Harrington.

C. B. Scarborough testified, for the State, that he assisted Sheriff Scarborough to get certain cattle from Lem Baker's pasture. All of the cattle had old brands. The old brands on some of them had been recently barred out. Twelve head of the cattle had the 4 connected H brand on them. That brand on six of them was about a month old, and had commenced to peel. The original brand on one of the cows was AP, but it was "barred out," and 4 connected H was branded on the side. These brands were fresh, not more than three or four days old. The ears of this cow had recently been cut short off. The ears of others of the cattle had also been cut off, in a manner to destroy the original mark. The cattle described by witness were taken from Baker's pasture on the second Saturday preceding this trial. On his cross examination, witness said that Willis was in the town of Anson on August fourth, fifth and sixth until noon. It was about twenty miles from Anson to Boyd's house. The 4-H brand and the new mark on the AP cow showed by blood and burned hair to be very fresh, and witness, when he first saw her, expressed the opinion that she was branded on the previous night. Defendant was in town during the entire week before witness took the cattle from Baker's pasture. Witness was an experienced stock man, and knew that the practice of stock men, in buying branded stock, was to bar out the old brands and put on new ones. It was not customary to cut off the ears of stock purchased, but, if the old marks could be easily or distinguishably changed to the purchaser's mark, the practice was to so change them; otherwise, the old marks were not interfered with.

One of the steers taken from Baker's pasture was originally branded PQP. That brand had been changed to ROB, and the ROB had been barred out with a cold iron. One of the cows

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was originally branded JIP. A bar had been burned through that brand, but the brand itself had not been changed.

Sheriff G. A. Scarborough testified, for the State, substantially as did C. B. Scarborough, and, in addition, that no claim on the new brands was ever made to the cattle. Boyd never claimed to own the cattle. Several of the animals were claimed, on the old brands, by different parties. The cow described in this indictment was claimed by W. T. Wright, on the AP brand. Witness got twenty-seven head of cattle from Baker's pasture, twelve of which were fresh branded 4-H connected, the 4 being reversed. Part of the cattle were taken from the pasture on Saturday, and part on Sunday.

Judge J. V. Cockrell testified, for the State, that after midnight on the Saturday preceding this trial he was awakened at his house by the arrival of his son, Fred Cockrell, and the State's witness Mixon, who wanted to see the district attorney. Mixon made about the same statement to the district attorney that he made on this trial. Witness let Mixon have his gun when he left.

The State closed.

Dave Harrington was the first witness for the defense. He testified that, on the evening after the sheriff got the "4-H connected" cattle out of Baker's pasture Mixon came to witness's house and asked witness where the cattle were. He said that he wanted to take them. Witness told him that he had called too late, as the sheriff had already taken them. Mixon then became, apparently, very uneasy, and remarked that he was afraid they would involve him in the prosecution for the theft of the animals. He talked like he had a hand in it, and said that he had proposed to the "boys" to go with him to Albany or Cisco, where he was not known, that he might execute a bill of sale to cover them. He said, also, that he put the cattle in the pasture, and told Willis to trade them for the horse. Cross examined, the witness said that he had never before testified to the foregoing facts, because he was never asked about them. He testified upon the examining trial that he did not know where Willis got the cattle. By that he meant that he did not know of his own knowledge.

Mrs. Carrie L. Boyd, the defendant's wife, testified, in his behalf, that Willis, her husband's co-defendant, had lived at her husband's house ever since he came to Texas. Witness and Miss Edwards went to Mixon's house on the day of the alleged offense,

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and witness told Mixon that her husband wanted him to go to his pen and help with cattle. Willis was not at Boyd's house when witness left, but was there when she got back, which was about one o'clock. The cattle were not in the pen when witness left home, but were there when she got back. Willis had been gone, and was about Anson for about a week, until that day. He spent that night at Boyd's house, and was there all of the next day, which was Sunday. Mixon, Boyd, Willis, Henson and Baker were at the pen when witness got back from Mixon's. Some time before that, the witness heard Mixon talking to Boyd about the sale by him of some cattle to Boyd, but could not recall the words or substance of that conversation. She merely knew from that conversation that Boyd was to get some cattle from Mixon. She knew nothing about the time he was to get them nor the price he was to pay. Willis went to Anson on the Monday following the Sunday of the transaction in the pen. Witness saw no branding done, either on Saturday or Sunday. Witness wrote a note to Baker about the cattle, and sent it by Mixon, on the second Sunday preceding this trial.

The charge of the court referred to in the fifth head note of this report reads as follows: "A conviction can not be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense. An accomplice, as the word is here used, means any one connected with the crime committed, either as a principal offender as given you in the foregoing charge. It means a person connected with the crime by some unlawful act on his part, transpiring either before, at the time or after the commission of the offense, and depends on whether he was present and participated in the commission of the crime charged."

The motion for new trial raised the questions discussed in the opinion.

Jones & Cunningham, F. G. Thurmond and C. I. Evans, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Appellant and one Willis were jointly indicted for the theft of one head of cattle, the property

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of one W. T. Wright. They severed on the trial, and each was separately convicted, and both cases are on appeal to this court.

By the testimony of W. G. Wright, the alleged owner, it appears that his home was in Taylor county, and that the range of the animal was on Elm creek, one and a half miles west of Abilene, in Taylor county. He had not seen the cow for three months, and did not know she had been stolen until he was notified. He found her in and received her from the possession of the sheriff of Jones county, who had taken her from the possession of the appellant and others in the latter county. There is no testimony, either positive or circumstantial, going to show that the defendants, or any one with whom they might be supposed to have been acting in concert, were ever seen taking or in possession of the cow in Taylor county. On the contrary, the first time the defendants are shown in the possession of, or as having any connection with the animal, is at the appellant Boyd's pen, some twenty miles from Anson, in Jones county, where they are shown to have changed the marks and brands upon it. At most, this evidence makes the case one of recent possession.

Recent possession is not positive evidence of theft—it is but a circumstance tending to establish it. A case dependent alone upon recent possession is a case of circumstantial testimony, and the law presenting that character of case should be submitted to the jury; because, whilst under certain conditions recent possession will support a conviction for theft, it is, in connection with such other conditions, only one of the circumstances from which the guilt is inferred. (*Perry v. The State*, 41 Texas, 484; *Faulkner v. The State*, 15 Texas Ct. App., 115; *Lehman v. The State*, 18 Texas Ct. App., 174; *Sullivan v. The State*, Id., 623; *Scott v. The State*, 19 Texas Ct. App., 325; *Ayres v. The State*, 21 Texas Ct. App., 400; *Willson's Texas Crim. Laws*, sec. 1299; *Schultz v. The State*, 20 Texas Ct. App., 308.)

Being a case of circumstantial evidence, it was error in the court to omit to charge, and was error to refuse the special requested instructions to the jury, with regard to the law governing such character of cases. With regard to recent possession, in general terms the rule is that if a party in whose exclusive possession property recently stolen is found, fails reasonably to account for his possession when called upon to explain, or when the facts are such as to require of him an explanation, the presumption of guilt arising from recent loss and possession will

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warrant a conviction, without the necessity of further proof. (Robinson v. The State, 22 Texas Ct. App., 690; Willson's Texas Crim. Laws, secs. 1299, 1300.)

In such a case, however, it should be left to the jury, under proper instructions, to determine the question of recent possession, and they should be explicitly instructed that, unless they found such possession was recent, they would indulge no presumption of defendant's guilt because of the fact of his being found in possession of the property. (Bragg v. The State, 17 Texas Ct. App., 219; Curlin v. The State, 23 Texas Ct. App., 681; McCoy v. The State, 44 Texas, 616; Willson's Texas Crim. Laws, sec. 1306.) The court omitted any charge upon this branch of the law of the case, and refused a special requested instruction calling attention to the matter.

As stated above, there was no direct evidence as to the original taking of the animal. It seems quite clear, however, that the defendants had every reason to know and believe that the cow was stolen when they changed her mark and brand, and when they received her into their possession; and it does appear to us that much trouble encountered by the prosecution might have been avoided by trying the defendants as receivers of stolen property, under article 743 of the Penal Code, or perhaps better still, for altering and defacing the mark and brand, as provided in article 760, Penal Code; both of which offenses are punishable as is theft. The prosecution, however, being for theft, and it being absolutely essential in support of that charge to connect the defendant with the original taking, to warrant his conviction, without such proof of connection any subsequent guilty connection with the stolen animal, such as a receiver of the same, or as the party who had illegally altered the mark and brand, would not be sufficient to warrant the conviction for theft.

"To inculcate a defendant as a principal offender in the crime of theft, the State must show that he had some connection with or complicity in the taking of the property. It does not suffice to prove that, subsequently to the taking and without complicity therein, but with knowledge that the property had been stolen, he aided the taker to dispose of it." (Cohen v. The State, 9 Texas Ct. App., 173; McAfee v. The State, 14 Texas Ct. App., 668; Tucker v. The State, 21 Texas Ct. App., 699.)

Without a very clear and positive understanding of this principle of law, it is manifest that an ordinary jury would be misled

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as to the character and weight to be attached to the subsequent inculpatory acts of defendant, though not connected with the original taking. Appreciating this danger, and to avoid it, defendant requested a special instruction, which the court refused, and which was in effect that, "before the jury can convict defendant, they must believe beyond a reasonable doubt that he is guilty of the original fraudulent taking, and any subsequent connection after the taking would not be theft, either in good or bad faith; and if the jury believed that the defendant purchased the cow from Mixon or any other party, after the fraudulent taking, either in good or bad faith, he is not guilty of theft." (Clayton v. The State, 15 Texas Ct. App., 348; Barrett v. The State, 18 Texas Ct. App., 64; Phillips v. The State, 19 Texas Ct. App., 159; Morrow v. The State, 22 Texas Ct. App., 240; Curlin v. The State, 23 Texas Ct. App., 681.) It was error to refuse this instruction under the circumstances of the case. (See Willson's Crim. Laws, sec. 1306.)

As to the testimony of the accomplice Mixon, we are of the opinion the charge was not sufficiently explicit upon the character of the corroboration. Such testimony must be corroborated not merely so as to show that such a crime as the one charged was committed, but the defendant's complicity in the crime committed. (Code Crim. Proc., art. 741.) The material matter in this case was the *original taking*—in other words, the theft of the animal—and, whilst it may be that the subsequent acts of defendant would tend in some degree to show complicity in the original taking, and whilst as to these acts the accomplice testimony was corroborated, these acts, as we have seen, did not prove the original taking, and under the circumstances developed in this case they tended very slightly, if at all, to prove it; because, whatever of corroboration there is in the evidence is alone as to matters occurring subsequent to the crime charged, that is, subsequent to the original taking or theft. As to the original taking, the accomplice himself professed to know nothing of it. It is a serious question, which we do not feel called upon now to answer, as to whether the corroboration in this case is of a character such as is contemplated by and would be held sufficient under the statute as to the main fact charged in this case. (Roach v. The State, 8 Texas Ct. App., 478; Harper v. The State, 11 Texas Ct. App., 1; Dunn v. The State, 15 Texas Ct. App., 560.) It certainly is not sufficiently conclusive, without proof *aliunde* of the

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main fact—which fact, it is true, may be established by the recent possession, unexplained, of the stolen property.

For the errors we have pointed out, the judgment will be reversed and the cause remanded.

Reversed and remanded.

Opinion delivered January 28, 1888.

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No. 2433.

W. E. WILLIS v. THE STATE.

1. **THEFT—EVIDENCE—CHARGE OF THE COURT.**—Upon a trial for theft—possession of the stolen property being the inculpatory fact—the State was correctly permitted to prove the defendant's contemporaneous possession of other stolen animals than that described in the indictment; such proof being admissible upon the question of identity in developing the *res gesta*, or to prove by the circumstances the theft on trial, or the intent of the accused with respect to the animal named in the indictment. But, in failing to limit such proof to such purpose, the charge was materially defective.
2. **SAME.**—An essential element of the crime of theft is that the property was taken by the accused with intent to appropriate the same to his own use and benefit. In the general charge in this case, this element, in the application of the law to the facts, was omitted. *Held:* That, in view of the proof on the trial, the omission was error.
3. **SAME.**—The defense requested a special charge, as follows: "If Boyd bought the cow from Mixon, whether in good or bad faith, and defendant's connection with the cow was only to aid in disposing of said cow—in other words, if said cow was stolen by some one else than defendant, and sold to Boyd—then defendant's subsequent connection with the cow would not be theft, and, if you so find, you will acquit the defendant." *Held:* That, in view of the evidence on the trial, the refusal of the special charge was error.

APPEAL from the District Court of Jones. Tried below before the Hon. J. V. Cockrell.

This is a companion case to that of *Boyd v. The State*, ante, 570, the conviction being for the theft of a cow, the property of W. T. Wright. The punishment assessed was a term of four years in the penitentiary. The evidence upon which this conviction

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tion is predicated is substantially the same as that adduced upon the trial of *Boyd v. The State*, supra.

Jones & Cunningham, F. G. Thurmond and C. I. Evans, for appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. This is a companion case to that of *Boyd v. The State*, just decided, appellant having been jointly indicted with *Boyd* in the theft of *W. T. Wright's* cow. We propose to discuss only those questions which did not arise in *Boyd's* case.

1. At the trial the State proved that other animals not belonging to the defendants were found in their possession, and whose marks and brands had been altered by defendants at the same time and place, and in the same manner, and under similar circumstances, as was the case with the cow in controversy. The scope, object and purpose of the admission of this testimony was not explained and limited by the charge of the court to the jury. Having admitted this evidence, it devolved upon the court in its charge to the jury to limit it to its legitimate purpose. (*Maines v. The State*, 23 Texas Ct. App., 568; *Wheeler v. The State*, Id., 598, and authorities cited; *Mayfield v. The State*, Id., 645.)

2. In the fifth paragraph of the charge, where the court is making an application of the law directly to the facts, he omits to instruct them that it was essential that defendant should have taken the cow *with intent to appropriate it to his own use or benefit*. This is part of the statutory definition of theft, and is essential, as an allegation, to the validity of an indictment for that crime (*Penal Code*, art. 724; *The State v. Sherlock*, 26 Texas, 106; *Willson's Texas Crim. Laws*, 1255), and is an essential element of the crime itself. We can not say that such omission was not an error, under the facts of the case, notwithstanding the court had previously charged the definition of theft in the statutory language. The pertinency and necessity of such a charge in this particular case is shown by the evidence. This appellant was never seen to take, was never heard to claim, and was never seen in possession of the animal under any circumstances which would indicate an assertion of ownership in it by him. His entire connection with the animal appears to have commenced after it had already been stolen, and whatever he

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did afterwards seems to have been done at the instance and for the benefit of others, and not for "his own use or benefit." If he had been shown to be one of the original fraudulent takers, he would unquestionably be held liable, even though it might appear that the taking was for the use and benefit of some one of those acting with him, and not for himself. But this is not the case presented. We think the omission in this instance was calculated to prejudice the rights of this appellant.

3. Other objections are urged to certain paragraphs of the charge as given, which we do not think material when the charge is considered as a whole. Defendant asked a special instruction which we are of opinion he was entitled to, and which was refused. This instruction was, in effect, that "if Boyd bought the cow from Mixon, whether in good or bad faith, and that defendant's connection with the cow was only to aid him in disposing of the said cow—in other words, if said cow was stolen by some one else than defendant, and sold to Boyd—then defendant's subsequent connection with said cow would not be theft; and, if you so find, you will find the defendant not guilty."

For the errors pointed out, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered January 28, 1888.

No. 2435.

W. E. WILLIS AND JAMES BOYD v. THE STATE.

1. **THEFT—FORMER CONVICTION.**—It is well settled in this State that the stealing of different articles of property, belonging to different owners, at the same time and place, so that the transaction is the same, is but one offense, and the accused can not be convicted on separate indictments charging different parts of one transaction as in each a distinct offense. A conviction on one of the indictments bars a prosecution on the other.
2. **SAME—CASE STATED.**—The proof on the trial showed that the defendants had been separately convicted for the theft of a cow, the property of one W. The animal involved in this prosecution was alleged to be the property of one C., and was found in the possession of the defendants at the same time and place and under the same circumstances as the W.

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cow. It showed, also, that when last seen, before being found in the defendants' possession, the W. cow was on her range a mile and a half west of the town of A.; and that the C. cow when last seen before she was found in the possession of the defendants, was on her range several miles southwest from the said town of A. Under this proof, the defendants pleaded in bar to this prosecution their former conviction for the theft of W.'s cow, alleging the taking of the two cows to be but one transaction. The jury found against the truth of the special plea. *Held*, that the finding of the jury was supported by the proof, and was correct.

3. **SAME—PRACTICE—JURY LAW.**—The statutes of this State provide that the trial jury shall communicate with the court through the foreman. In this case the written inquiry to the court was signed by a member of the jury other than the foreman, to which neither the judge nor the foreman of the jury objected. *Held*, that such proceeding was merely irregular, and in the absence of apparent injury to the accused was wholly immaterial.
4. **SAME—SPECIAL PLEA—BURDEN OF PROOF—CHARGE OF THE COURT.**—In response to an inquiry by the jury the trial judge instructed them that the burden of proving their special plea of former conviction rested upon the defendants. *Held*, correct.
5. **SAME—RECENT POSSESSION OF STOLEN PROPERTY—EVIDENCE.**—The inculpatory fact relied upon in this case was the recent possession of the alleged stolen property by the defendant. The question raised by the proof was whether or not the facts established a case of recent possession. In failing to give in charge to the jury proper instructions as to the law applicable to such possession, the trial court erred.
6. **SAME.**—The defendant Willis requested the court to specially charge the jury as follows: "Should you believe from the evidence that defendant W. E. Willis simply stayed, or went home, if Boyd's house was his home, and was requested to assist in branding said cattle, without a previous agreement or participation in the offense charged, you will acquit him." *Held*, that, in view of the evidence tending to support this defense, the refusal of this special instruction was error.

APPEAL from the District Court of Jones. Tried below before the Hon. J. V. Cockrell.

This is a companion case to the preceding cases of *Boyd v. The State* and *Willis v. The State*, the prosecution in this case being for the theft of a cow, the property of one D. E. Coffman. The proof showed that the Coffman cow was one of the animals found in the possession of the defendants at the same time that they were found in possession of Wright's cow, involved in the cases above referred to. Otherwise the evidence in this case was substantially the same as that developed on the previous separate trials of the defendants for the theft of Wright's cow,

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which will be found fully set out in the report of Boyd's case, ante page 570.

Jones & Cunningham, F. G. Thurmond and C. I. Evans, for the appellants.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. This is a companion case to the cases of *Boyd v. The State* and *Willis v. The State*, decided on a former day of the term, the two convictions in those cases in the court below being for the theft of a cow, the property of W. T. Wright. This case presents a joint prosecution and joint conviction for the theft of one head of neat cattle, the property of one D. E. Coffman. There is but little if any difference in the facts proven in this and the two other cases. It will be remembered that the Wright cow ranged one and a half miles west of Abilene in Taylor county. Coffman's cow ranged five or six miles southwest of Abilene in Taylor county. Coffman had not seen his cow in her range since the fall of 1886. When she was next seen she was in the pen of appellant Boyd in Jones county, on the tenth of August, 1887, where these appellants and other parties altered the mark and brand upon her. Neither of these appellants nor any one shown to have been acting in concert with them, was ever seen in possession of the animal in Taylor county. When found in possession in Jones county, they made no explanation nor attempted any as to their possession.

On this trial they pleaded specially in bar to the prosecution that they had already been tried and convicted for the theft of the Wright cow, and that the taking, if any, of the two cows was one and the same transaction, and occurred at one and the same time and place, and that the evidence necessary to a conviction in the one was essential to a conviction in the other case. It is a well settled rule that the stealing of different articles of property belonging to different persons at the same time and place, so that the transaction is the same, is but one offense, and the accused can not be convicted on separate indictments charging different parts of one transaction as in each a distinct offense. A conviction on one of the indictments bars a prosecution on the others. (*Wilson v. The State*, 45 Texas, 76; *Wright v. The State*, 17 Texas Ct. App., 551; *Shubert v. The State*, 21 Texas Ct. App., 551.)

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This plea was submitted to the finding of the jury under appropriate instructions by the court, and in their verdict in response to this issue they found the special plea to be untrue. Upon the facts before them we are of opinion the jury were warranted in this finding, because, in addition to the fact that the animals belonged to different owners, they did not run in the same range, and it is not probable they were taken at the same time and place. (Alexander v. The State, 21 Texas Ct. App., 406.)

With regard to this special plea, it appears that the jury, after their retirement to consider of their verdict, wished additional instructions from the court as to the party upon whom the burden of proof rested to establish the issue presented by said plea. A writing propounding this question was sent to the judge through the sheriff, but the same was not signed by the foreman but by one of the other jurors. This, it is insisted, was violative of the statutes which provide that a jury shall communicate with the court through their foreman. (Code Crim. Proc., arts. 695, 696; Shipp v. The State, 11 Texas Ct. App., 46; Conn v. The State, Id., 390; McDonald v. The State, 15 Texas Ct. App., 493.) At most the matter complained of was an irregularity, and it is one which does not appear to have been objected to by either the court or the foreman of the jury. How the defendants have been prejudiced or injured by the fact that the request was signed by one of the jurors, and not by the foreman, is not manifest. In response to the request the court instructed the jury that the burden of proof to establish the special plea by a preponderance of evidence was upon the defendants. This instruction was correct. Upon a special plea of this character the defendant asserts the affirmative of the issue, and the obligation rests upon him to prove it. (Hozier v. The State, 6 Texas Ct. App., 501; Jones v. The State, 13 Texas Ct. App., 1.)

As before stated, appellants nor either of them were ever seen in possession of the animal in Taylor county, and it had not been seen by the owner on the range in that county for several months prior to the time it was found in Boyd's pen in the possession of appellants. It was a question as to whether the facts established a case of recent possession or not, and this question of recent possession should have been submitted to the jury under proper instructions as to the law applicable to such possession. (Lehman v. The State, 18 Texas, Ct. App., 174, and

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authorities there cited, and *Boyd v. The State*, ante, 570. No such instruction was embraced in the charge given.

Again, in so far as the appellant Willis is concerned, we are of opinion the facts connecting him with the animal demanded of the court the giving of his special instruction which was requested in these words, viz.: "Should you believe from the evidence that defendant W. E. Willis simply stayed or went home, if Boyd's house was his home, and was requested to assist in branding said cattle, without a previous agreement or participation in the offense charged, you will acquit him." This instruction was refused and the ruling was erroneous. (*Perry v. The State*, 41 Texas, 483; *Allen v. The State*, 42 Texas, 517.) Such other questions as are not herein noticed will be found discussed in *Boyd v. The State*, ante.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered February 1, 1888.

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No. 2430.

HENRY COWARD v. THE STATE.

1. **THEFT—INDICTMENT.**—Inasmuch as asportation is not necessary in this State to constitute theft, and inasmuch as the marking and branding of an animal can not be accomplished without an actual manual possession of the same by the person so doing, an illegal marking and branding of an animal for the purpose of appropriating the same will evidence a fraudulent taking. But note the opinion for a state of proof which would more properly support an indictment for defacing or altering brands, as that offense is defined by article 760 of the Penal Code.
2. **SAME—CHARGE OF THE COURT—EVIDENCE—CASE STATED—JUDGMENT.** The indictment charged the appellant with the theft of "one head of neat cattle." The proof shows that the cow of the alleged owner, with her original ear marks changed into the ear marks of the appellant, was found in the pen of the appellant, the appellant and another being present. To the owner's claim of property, the appellant asserted no counter claim, nor did he offer any explanation of his possession, but helped to turn the cow out of the pen. Afterwards, a yearling, the offspring of the cow, was found upon the range, both the brand and the ear marks of the owner of the cow, originally upon it, having been changed to the brand and ear marks of the appellant. *Held*, that the proof should have

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been made to designate which of the animals was referred to in the indictment, and the charge of the court should have limited the evidence respecting the other animal to the legitimate purpose for which it was received. For the same reason,—that it does not identify the animal referred to in the indictment,—the evidence is insufficient to support the judgment of conviction.

3. **SAME—POSSESSION OF RECENTLY STOLEN PROPERTY.**—The charge of the court was otherwise erroneous inasmuch as, although the proof established an unexplained possession of property recently stolen, it failed to instruct the jury upon the law applicable to that phase of the case.

APPEAL from the District Court of Edwards. Tried below before J. H. Clark, Esq., Special Judge.

The conviction in this case was had under an indictment which charged the appellant with the theft of "one head of neat cattle," the property of William Kelso, Sr. The penalty assessed against the appellant was a term of two years in the penitentiary.

William Kelso, the first witness for the State, testified that he lived in Edwards county, Texas, and had but a slight acquaintance with the defendant. The witness, during the month of April, 1887, owned a certain cow and her yearling calf, which ran on the range near his house. The witness's brand on the yearling was a character or device which the witness could not make. About the last of April or the first of May, 1887, the witness and his son, James Kelso, riding on the range, found the said cow and yearling. The witness's cattle ear mark, which was a crop off the left and an underbit in the right ear, had been recently changed to a crop off the left and an overslope and underslope off the right ear on each animal, and the witness's brand on the yearling had been recently burned or blurred out, and that animal fresh branded BOY on the side and B on the hip. The said fresh brands and ear marks, the witness understood, belonged to the defendant, though witness did not know that fact of his own knowledge. The brand on the cow had not been changed or interfered with. Witness and his son drove the said animals to Nobles's pen, where they examined them in the presence of Nobles, Kirchner and Ira Wheat. The blood on the ears of the animals indicated that the changes had been made on the two animals about the same time, and not more than a week before. Independent of their marks and brands, the witness knew his said animals by their flesh marks. He never gave permission to the defendant or any other person to take or disfig-

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ure either of said animals. The defendant lived about five miles from the range of the witness's animals. Mr. Nobles, Mr. Kirchner, Mr. John Sweeten, Doctor Runnells and others lived in the same neighborhood. Witness had lived in the neighborhood but a short time when the brand and ear marks on his animals were disfigured. He brought those animals with him when he removed to the neighborhood. This all occurred in Edwards county, Texas, about the last of April or the first of May, 1887.

William Kelso, Jr., testified, for the State, that about May 1, 1887, he went to the place of Charles Franks, in Edwards county, and in the cattle pen on the said place he found a cow which he recognized at once as the property of his father, the witness W. Kelso, Sr. The original ear marks, as described by the preceding witness, had been recently changed to a crop off the left and an over and underslope off the right ear. The cow's ears were still bloody, from which fact the witness concluded that the change was made on the preceding day. The defendant and one Ab Benton were in the pen at the time. Witness claimed the cow as the property of his father, and cut her out of the pen, assisted by defendant and Benton. Neither defendant nor Benton made any explanation of their possession of the cow when the witness claimed her as the property of his father. The fresh marks, crop off the left and over and underslope off the right ear, into which the cow's mark had been changed, were the cattle marks of defendant's brother, W. A. Coward, who lived in San Marcos, Texas. W. A. Coward's cattle brand was BOY on the side, and B on the hip. W. A. Coward's cattle in Edwards county were in the care, control and management of the defendant. On the next day after the witness turned his father's cow out of Franks's pen, he found her and her yearling calf on the range, about a mile and a half from the Franks pen. The marks on the yearling, originally the same as on the cow, had been, about the same time as on the cow, changed in like manner, and the brand of witness's father on the yearling had been blurred out and the W. A. Coward brand, BOY on the side, and B on the hip, put on. The new brands were very fresh, and were evidently put on at the same time that the ear marks of the animals were changed. Leaving the cow and yearling on the range, the witness started on to his work. Meeting his brother James, he told him of the discovery of the cow and yearling, and the alterations of the brand and ear marks, and told him to tell their father to look out

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for them, as he, witness, then working for other parties, could not do so.

James Kelso, the son of the first and the brother of the second State witness, testified, for the State, substantially as did his father.

Sam Nobles testified, for the State, that he lived in Edwards county, Texas. Late in April or early in May, 1887, W. Kelso, Sr., and his son James brought a cow and yearling to his pens and examined them in his presence. The ear marks on each of the animals had been recently changed from their original mark into a crop off the left and an over and under slope in the right ear, and the original brand on the yearling had been as recently burned over, and the BOY on the side and B on the hip brand placed on it. The new brand and ear marks were the mark and brand of W. A. Coward, of San Marcos, Texas, who, so far as witness knew, had not been in Edwards county for two years. It was witness's understanding that defendant had the care and management of W. A. Coward's Edwards county cattle. The disfiguration of the marks and brands must have been done about four days when witness saw the animals at his pen, as stated.

The State closed.

George Maule was the first witness for the defense. He testified that he had known the defendant for four years. Defendant controlled the BOY—B brand of cattle in Edwards county. The mark which belonged to the brand was a crop off the left and an over slope and under slope off the right ear. That mark and brand was once owned by Mr. Franks.

Ab. Benton was the next witness for the defense. He testified that he lived on Lost creek, about five miles distant from Franks's cattle pen, in Edwards county. The fresh marked cow claimed by W. Kelso, Jr., as the cow of his father, was placed in the Franks pen by Franks and the witness. That cow, being branded H1SN, which was Kelso's brand, fell in with a herd being driven by Franks and witness, and was driven on to the pen with the herd, where she was freshly marked in the old Franks mark. After dinner, a few days later, Franks left home, leaving the cattle in the pen. Two or three hours later the defendant rode up, and went with the witness to the pen. William Kelso, Jr., soon came up, claimed the said cow, and cut her out of the herd and drove her off. Neither the witness nor the defendant set up a claim to the cow when young Kelso claimed her, nor did they

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explain their possession of the same. The fresh marks were then about three or four days old. Defendant was controlling the BOY—B brand for his brother, who owned it. His brother lived in San Marcos, and had not been in Edwards county for two or three years.

The case was closed by the defense introducing in evidence the bill of sale executed by C. E. Franks on January 20, 1887, conveying to W. A. Coward the BOY—B brand of cattle in Edwards county, Texas. It recited the ear mark as a crop off the left and an over and under slope off the right ear.

No brief for the appellant has reached the Reporters

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Appellant was convicted upon an indictment charging him with the theft "of one head of neat cattle," the property of Wm. Kelso, Sr.

It is shown by the evidence that two animals belonging to the alleged owner were found with their ear marks changed into the ear mark of defendant and the brand upon one of the animals was also obliterated and the brand of defendant placed upon it. One was a cow, the other was a yearling and the calf of said cow. When the cow was first seen after her ear mark was changed, she was in a pen and defendant and another party were present. When she was claimed as the property of Kelso, defendant asserted no claim to her, but helped to turn her out of the pen; nor did he make any explanation as to the fact that the ear mark had been changed into his ear mark. The yearling was found afterwards upon the prairie, with its mother and with its ear marks and brand both changed into the mark and brand of defendant. It occurs to us that the indictment would have made a case less difficult had it been brought for altering or defacing a mark and brand, as provided in article 760 of the Penal Code.

We see no good reason, however, why a fraudulent taking of an animal may not be evidenced by an illegal marking and branding for the purpose of permanently appropriating it, since asportation is not necessary to constitute theft (Penal Code, art. 726), and since it is manifest that marking or branding can not be accomplished without an actual manual possession of the animal by the party engaged in it.

There are two questions which present themselves on the re-

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cord, growing out of the charge of the court with reference to the facts. In the first place, the evidence shows the theft of two animals, whilst the indictment only charges the theft of one. Contemporaneous acts or crimes are admissible as evidence to show motive, intent, identity, etc., and it was admissible to prove, as was done, that the marks upon both animals were defendant's, and further to establish by the facts stated that they must have been changed at or about the same time. This tended to show motive, intent and identity of the party committing the crime. But the question is, which of the two animals stolen was the one named in the indictment, and for which the prosecution was being conducted? If the yearling, then proof that the cow also had been taken was proof of an independent crime, which, though admissible as evidence of motive, etc., was not proof of the crime charged, and vice versa. Under such a state of facts it was all important that it should have been known which animal the prosecution was claiming a conviction for; so that the court could explain and limit in the charge to the jury the only purpose for which the evidence affecting the other animal was admitted. This the court nowhere does in the charge, and the failure to do so is reversible error.

Again, the evidence shows an unexplained possession of property recently stolen, and the jury were not instructed upon the rules of law applicable to such a character of theft. This omission was also error. Upon these two points see *Boyd v. The State*, ante, 570, and authorities cited.

When considered in the light of the evidence, we have serious doubts if the judgment rendered in this case is sufficiently certain as to enable the accused to plead it successfully in bar of another prosecution for the same offense. The indictment charges the theft of one head of neat cattle. This seems sufficient in so far as that instrument is required to allege. (*Willson's Texas Crim. Law.*, sec 1316.) But the evidence shows that two animals were taken, not at the same time it would seem, but under similar circumstances. It is impossible to identify the particular animal the defendant has been convicted of stealing. If hereafter prosecuted for theft of the cow and he should plead this judgment in bar, could he do so successfully, should the State claim that the present prosecution and conviction were not for theft of the cow but the yearling, or vice versa? Such uncertainty could and should be avoided by a selection on the part

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of the prosecution, of the animal for the theft of which the conviction would be claimed.

The judgment is reversed and the cause is remanded for another trial.

Reversed and remanded.

Opinion delivered January 28, 1888.

No. 2455.

BEN FULLER v. THE STATE.

THEFT—CIRCUMSTANTIAL EVIDENCE—CHARGE OF THE COURT.—See the statement of the case for evidence on a trial for horse theft, which, being wholly circumstantial, is *held* to have demanded from the trial court a charge upon the law applicable to circumstantial evidence.

APPEAL from the District Court of McLennan. Tried below before W. M. Flournoy, Esq., Special Judge.

This conviction was for the theft of a mare, the property of August Dulock, in McLennan county, Texas, on the first day of November, 1877. A term of ten years in the penitentiary was the penalty assessed by the verdict.

August Dulock, the first witness for the State, testified that he lived in McLennan county, Texas, about eleven miles east of Waco. He owned two mares on or about the date alleged in the indictment. Their accustomed range was contiguous to the witness's farm. After using the animals all day on the day alleged in the indictment, he turned them upon their range. When he looked for them a day or two afterwards he failed to find them, but received information which led him to believe that the defendant had stolen them. Acting upon the information thus received, the witness went to Corsicana and found the animal mentioned in the indictment in the possession of the mayor of that city, who told him that he had bought the said animal from the defendant. Witness proved his property and received it from the mayor, Mr. Harrall, and he and Harrall went to the jail where defendant was confined, to see him. Mayor Harrall pointed the defendant out as the man who had sold him the ani-

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mal, and witness recognized the defendant as Ben Fuller. Witness had known defendant for more than a year prior to the theft, during which time the defendant lived with his father near the witness's place. Witness did not consent for the defendant to take his mare.

John Harrall testified, for the State, that he bought the animal described in the indictment from the defendant, in 1877. Mr. Dulock afterwards proved his title to the animal and recovered it from the witness. The witness never saw the defendant prior to the purchase of the animal. He took Dulock to the jail and pointed the defendant out to Dulock, who identified him as Ben Fuller.

Green Sweat testified, for the State, that he knew the defendant. Mr. Dulock was mistaken as to the date of the theft of his mare, because, to the knowledge of witness, the defendant lived in east Texas in 1877. In 1876 he lived in San Saba, Texas. In November, 1876, Ben Fuller and another man were at the witness's tent in San Saba. On that occasion defendant told witness that he, defendant, would ride a good horse when he got to McLennan county. Witness asked him where he would get it. He replied that old man Dulock had two good ones. He left San Saba on the next day, saying that he was going to McLennan county. Witness went to McLennan county two or three days after Dulock missed his mare. Witness told his father what defendant said to him in San Saba about Dulock's horses, and his father put old man Dulock on the track of the animal.

The motion for new trial raised the question discussed in the opinion.

Pearre & Boynton, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. This conviction is founded wholly upon circumstantial evidence, and the trial judge omitted to instruct the jury in relation to that character of evidence. This is error for which the conviction must be set aside. (Counts v. The State, 19 Texas Ct. App., 450.) The Assistant Attorney General confesses this error.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered February 1, 1888.

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No. 2340.

P. D. STOCKHOLM, JR., v. THE STATE.

1. **PRACTICE—CONTINUANCE.**—Absence of one of defendant's attorneys from the court when the case is called for trial will not entitle him to a continuance, when it appears that he is represented by other counsel and that no one of his rights is jeopardized.
2. **SAME—EVIDENCE—CASE STATED.**—At a former term of the trial court the defendant was tried and convicted of theft, but upon the affidavit of his co-defendant, who was separately tried and acquitted, he was awarded a new trial. Upon this trial, his co-defendant having departed this life, the defendant offered in evidence the affidavit of his co-defendant upon which he secured the new trial. *Held*, that the proposed evidence was properly excluded.
3. **SAME—IMPEACHING TESTIMONY—CHARGE OF THE COURT.**—The trial court charged the jury as follows: "When the general reputation of a witness for truth and veracity in the community in which he lives has been attacked, the inquiry must be confined to his general reputation, and not what a particular individual or a few individuals may believe concerning him; and the investigation is to be confined to his general reputation for truth and veracity, and should not extend to his general moral character; and the jury is authorized to refuse to credit and believe any witness whose reputation has been so attacked, or you may credit and believe him as you see fit and proper and believe to be proper to do so, just as though his reputation had not been so attacked; for, as before told you, you are the sole and exclusive judges of the credibility of each and all of the witnesses who have testified before you in the case." *Held*, in view of the evidence in this case, materially erroneous.

APPEAL from the District Court of Orange. Tried below before the Hon. W. H. Ford.

The indictment in this case, which charged the appellant with the theft of a cow, the property of William McFaden, in Jefferson county, Texas, was presented in the district court of Jefferson county, but upon the defendant's application the venue was changed to Orange county. The trial in the latter county resulted in the conviction of the appellant and the assessment against him of a term of two years in the penitentiary.

George White testified, for the State, that he lived in Beaumont, Jefferson county, Texas, and in January, 1885, was in the employ of the Beaumont Pasture Company. On the twenty-

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sixth day of that month, the witness discovered the defendant and one Cyrus H. Patridge, both of whom he knew well, in the act of butchering the carcass of a heifer that had been recently killed. They had the animal skinned, and two quarters of the meat secured to a horse. Witness came upon them suddenly in a small island of timber into which he went to answer a call of nature. When witness came up on the parties, defendant remarked: "You have caught us." The animal was the property of William McFaden. It was a red heifer, branded M6, connected, the 6 being formed by a right hand curve to the last stroke of the M. This all occurred in Jefferson county, Texas. On his cross examination the witness said that he discovered the parties butchering the carcass of the heifer between nine and ten o'clock a. m., on or about January 26, 1885. He testified on a former trial of this case, and may have testified on that trial that the offense was committed on January 26, 1885, or a day or two before or after that date. He did not recollect that he testified on that trial that it was between nine and eleven o'clock a. m. Witness had a conversation with Cave Rowley, in Rowley's grocery, about this matter, in February or March, 1885, and, in the presence of C. H. Patridge and others, he told Rowley that he knew nothing damaging to defendant and Patridge. Witness was then under oath administered by the grand jury, and did not feel that he was at liberty to tell any one the truth about the matter. He told J. O. Leonard about the same thing he told Rowley.

James Stewart testified, for the State, that he was the step-son of the witness White, and lived in Beaumont. On or about January 26, 1885, witness went to the prairie to see his said step-father. In his search for his step-father, the witness went into a small island of timber, in which he surprised the defendant and Patridge butchering a heifer. They had it skinned and two of the quarters were on a horse. They ordered witness to "skip out," and witness did so, crossing the bridge over the gully at the island.

William McFaden testified, for the State, that he individually owned the M6 (connected) brand of cattle. He never gave his consent to the defendant, nor to Patridge or anybody else to take or kill the animal described in the indictment. Witness, Kyle and Weiss, composed the Beaumont Pasture Company. The entire business of that concern was under the witness's

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management and control. George White was in witness's employ.

William Holland testified, for the State, that he had never been offered money or other consideration by William McFaden to swear on this or any other trial that he saw defendant, Patridge or anybody else butchering the carcass of one of his, McFaden's, or anybody else's animal. He never told Bolen nor anybody else that McFaden had ever made him such an offer.

The State rested.

J. O. Leonard was the first witness for the defense. He testified that C. H. Patridge, deceased, was his uncle-in-law—that is, witness's father and Patridge were brothers-in-law. On or about February 26, 1886, George White told witness that he knew nothing damaging to either defendant or Patridge in connection with this case; that all he knew about it was that he saw Patridge skinning a beef, and that Lawson Gray held Patridge's horse while Patridge did the skinning. Witness knew the location of the island of timber in which White claimed to have seen defendant and Patridge skinning the heifer. It was in plain view of quite a number of occupied houses. Patridge was brought to Beaumont, by his wife, in an ambulance on January 27, 1885. He had been poisoned and was in a dangerous condition. Mrs. Patridge took him home—about fifteen miles from Beaumont—on January 29. Witness knew the reputation of George White for truth and veracity. It was bad, and from witness's knowledge of that reputation, it was such as to render the said White unworthy of belief on oath.

Charles Hemingway testified, for the defense, that he lived in the pasture of the Beaumont Pasture Company. Witness was familiar with the island of timber mentioned by the State's witness. He knew the gully referred to by the witness Stewart, and knew that there was no bridge across it on January 26, 1885. It was washed away by a freshet at least three weeks before that date. The water in the gully where the bridge had been was at least seven feet deep on January 26, 1885. Witness knew also that the defendant worked all day on his house during the twenty-sixth, twenty-seventh and twenty-eighth days of January, 1885. Defendant was at home throughout Saturday and Sunday, January 24 and 25, 1885.

Lawson Gray testified, for the defense, that he lived about a mile from the island of timber referred to by the State's witnesses. On the morning of January 26, 1885, witness went with

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defendant and Patridge as far as the said island, on their way to a small marsh where they had some timber they wanted to see to. Patridge and defendant crossed the gully in a boat, and witness went to the place where the bridge had been, to get across. He found the water so high that he had to seek another and remote way around. Witness returned to his home about ten o'clock. Soon after that, witness saw defendant at work, taking down a house which witness had sold him.

Nat Smith testified, for the defense, that he lived near the island of timber described by the State's witnesses. He saw defendant at work on his house nearly all day on January 26, 1885, and all day on the next two days.

N. Smith testified, for the defense, that he worked all day on defendant's house on January 26, 27 and 28, 1885. Defendant worked with witness on that house during that time, except for a short while on the morning of the twenty-sixth, when he went with Lawson Gray to the marsh to see about some timber. He got back to his house about ten o'clock and resumed work.

A number of witnesses called by the defense, testified that George White's reputation for truth and veracity was so bad that he was not entitled to belief on oath. An equally large number of State's witnesses supported the reputation of George White for truth and veracity, and declared it to be irreproachable.

The motion for new trial raised the questions discussed in the opinion.

H. W. Greer, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. The defense asked a continuance of the case on account of the absence of the leading counsel, Hal W. Greer, which was denied, and this was urged as error. It is not made to appear in the motion for a new trial, or otherwise, that any injury resulted to appellant, he having had the services of two attorneys. This being so, the refusal of the continuance was not error. (*Booth v. The State*, 4 Texas Ct. App., 217.)

The appellant and one Patridge were jointly indicted and at a former term, a severance being granted, appellant was convicted and Patridge acquitted. The motion for a new trial in appellant's case was supported by the affidavit of Patridge, and was granted.

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Upon this trial the defense offered in evidence this supporting affidavit of Patridge, it having been shown that he was dead. This evidence the court rejected, and this is urged as error. The ruling of the court was correct. We know no rule of evidence holding such a document competent evidence bearing upon any issue in the case.

The court charged the jury as follows: "When the general reputation of a witness for truth and veracity in the community in which he lives has been attacked, the inquiry must be confined to his general reputation, and not what a particular individual or a few individuals may believe concerning him, and the investigation is to be confined to his general reputation for truth and veracity, and should not extend to his general moral character; and the jury is authorized to refuse to credit and believe any witness whose reputation has been so attacked, or you may credit and believe him as you see fit and proper, and believe to be proper to do so, just as though his reputation had not been so attacked; for, as before told you, you are the sole and exclusive judges of the credibility of each and all of the witnesses who have testified before you in the case." Several witnesses having testified, for the defense, in effect, that the reputation of the State's witness, George White, for truth and veracity was bad, it is urged that the charge is objectionable as being on the weight of evidence.

This charge was wrong, and under the peculiar facts of this case it was evidently injurious to appellant. See such a charge discussed in *Bishop v. The State*, 43 Texas, 394; 1 Texas Court of Appeals, 440; *Leverett v. The State*, 3 Texas Court of Appeals, 213.

This error in the charge of the court, under the facts of this case, though not excepted to, requires a reversal of the judgment. There are no other errors assigned.

Reversed and remanded.

Opinion delivered February 1, 1888.

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No. 2414.

NICOLAS GUAJARDO v. THE STATE.

1. **PRACTICE—EVIDENCE.**—On a trial for theft the State, over the objection of the accused, was permitted to prove that, for the four or five years prior to the trial, the accused had been confined in the penitentiary for felony. *Held*, that the proof was illegal and incompetent. Its admission was error in the first place, and the trial court further erred in overruling the motion of the accused to exclude it from the consideration of the jury.
2. **SAME.**—District Court Rule No. 57 provides, with regard to exceptions to evidence, that, if the evidence is obviously competent and admissible as tending to prove any fact put in issue by the pleadings, then the objection must assign the reason upon which it is interposed. Note a case to which the rule does not apply.
3. **HORSE THEFT—CIRCUMSTANTIAL EVIDENCE—CHARGE OF THE COURT.** See the statement of the case for evidence on a trial for horse theft which, being wholly circumstantial, is held to have demanded of the trial court a charge upon circumstantial evidence.

APPEAL from the District Court of Nueces. Tried below before the Hon. J. C. Russell.

The conviction in this case was for the theft of two horses, the property of A. A. White. The penalty assessed by the verdict was a term of five years in the penitentiary.

A. A. White was the first witness for the State. He testified that he lived in Victoria county, Texas, on the Victoria and Refugio road, and about three miles distant from Victoria. On the evening of November 30, or December 1, 1886, while witness was at his corn crib, two Mexicans came to his fence, called to him, and asked for something to eat, at the same time saying they had a sick companion at their camp, which was in sight. Witness told them that it was too late for him to have meals prepared for them, but that they could go to a negro cabin in sight, and get what they wanted. They left, and the negroes afterwards told witness that they gave the Mexicans something to eat, for which they received an old coat in payment, the Mexicans claiming that they had no money. Witness was unable to identify the defendant as one of those Mexicans. On that evening the witness went to the town of Victoria. He returned

24	603
30	676
24	603
34	202

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about dusk and turned his team, two horses, into the horse lot. Those horses were taken from the lot during the night, and witness missed them on the next morning. He made diligent search throughout the country for them, but failed to find them. He was afterwards notified by the sheriff of Nueces county that his animals were in Corpus Christi. He went to Corpus Christi, and the horses were delivered to him by the sheriff. The horses belonged to the witness, and were taken from his possession without his knowledge or consent.

George Elsworth testified, for the State, that the sheriff of Nueces county, upon receiving a telegram to watch for two suspicious looking Mexicans, then en route for Corpus Christi, with two horses supposed to be stolen, sent the witness and another man to the crossing near the reefs to watch for them. A short while after dark on the night of December 1, 1886, the witness met the defendant and another Mexican in the "rincon" between the reef and the city of Corpus Christi. They were riding horses without saddles or bridles. Witness seized the rope of the horse ridden by the defendant, and ordered the Mexican to halt. Defendant made no effort to escape, but his companion succeeded in escaping. Defendant then claimed that the horse he was riding belonged to his companion who had escaped, and whom he called Antonio. He said that Antonio, riding one and leading the other horse, overtook him on the road, and loaned him the horse to ride to Corpus Christi. Afterwards the defendant told witness that the name of his companion was Refugio Aguirre, and he had since ascertained that Aguirre is now a convict in the penitentiary. In reply to questions propounded by the defense in cross examination, the witness stated that he knew the defendant, and that the defendant's home was in Corpus Christi. The district attorney, upon re-examination, asked the witness where the defendant had lived for the last four or five years. Over the defendant's objection, the witness was permitted to answer that during the period named the defendant had lived in the penitentiary. The defense then moved that the question and answer be stricken out, and withdrawn from the jury; which motion was overruled.

Pat Whelan, sheriff of Nueces county, testified, for the State, that he knew the defendant and Refugio Aguirre, both of whom were reared in Corpus Christi. Defendant knew Aguirre well and could, at no time, have been ignorant of his right name.

The State closed.

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Juan Garcia was the first witness for the defense. He testified that he knew the defendant. On or about the last day of November, 1886, the witness, traveling the main public road, and going from the town of Refugio to the town of Victoria, met the defendant, who was alone and traveling on foot towards Refugio. Defendant was then about fifteen miles from Refugio, which town was about forty-five miles from Victoria.

Rosalio Cisnovo testified, for the defense, that he lived in the town of Refugio. On returning to his home late on the evening of November 30, 1886, the witness found the defendant at his house. No person came with defendant to witness's house, and witness was informed that defendant came there on foot. He had no horse at the house, and witness observed that his feet were much swollen as if from long walking. On the morning of December 1, 1886, defendant left witness's house on foot, going off towards Corpus Christi, to which town he said he was going.

Andrew Green testified, for the defense, that he lived within a mile of the town of St. Mary's, in Refugio county. When witness came home from his work on the evening of November 30, 1886, he found the defendant and another Mexican at his house. They had two horses, which were picketed on the road side a short distance from the house and in open public view. Within a short while the two Mexicans left with their horses, going towards Corpus Christi.

The motion for a new trial raised the questions discussed in the opinion.

Waul & Walker, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. This appeal is from a conviction for theft of a horse, and the case is submitted by the Assistant Attorney General on confession of error.

Over objection of appellant, the State proved that he, appellant, had lived in the penitentiary as a convict for the last four or five years. This fact being elicited by a question not necessarily calling for such an answer, counsel for appellant also moved the court to exclude this matter from the consideration of the jury, and, the court refusing, an exception was reserved. We will not discuss the competency of such supposed evidence. The action of the court in admitting and refusing to exclude this matter from

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the jury was simply, whether intended or not, an outrage upon the rights of the accused.

It may be contended that, as no reason or ground of objection was stated by counsel for appellant, defendant can not complain of the ruling of the court. The rule upon this subject is that, if the evidence is obviously competent and admissible as tending to prove any of the facts put in issue by the pleadings, then a reason should be assigned for objecting to it. (Rules for District Courts, No. 57.) That appellant had lived as a convict in the penitentiary for the last four or five years was not competent and admissible evidence to prove, or tend to prove, any issue raised in this case, hence no ground of objection to its admissibility was required.

This is a case depending alone for conviction upon circumstantial evidence. The rules applicable to such a case should be given in charge to the jury. This was not done, which was error.

For the errors above noticed, the judgment is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered February 1, 1888.

No. 2426.

J. Y. CRISWELL v. THE STATE.

THEFT—CHARGE OF THE COURT—CONTINUANCE—NEW TRIAL.—See the opinion in extenso, and the statement of the case for proof developed on a trial for horse-theft, which, raising the defense of mistake of fact on the part of the accused in asserting claim to the animal alleged to have been stolen, demanded of the trial court the submission of that issue to the jury under proper instructions. Note also that, in view of the proof, the trial court having refused the accused a continuance, should have awarded him a new trial.

APPEAL from the District Court of McCulloch. Tried below before the Hon. J. C. Randolph.

The indictment in this case charged the appellant and John Criswell jointly with the theft of a horse, the property of B. F.

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Rosser, in McCulloch county, Texas, on or about April 30, 1885. A severance being awarded, the defendant was first placed upon trial, which resulted in his conviction, with a term of five years in the penitentiary assessed against him as a punishment.

B. F. Rosser was the first witness for the State. He testified that he lived in McCulloch county, and had lived there since the fall of 1881. The animal mentioned in the indictment was foaled in the spring of 1881, in Ellis county, Texas, where the witness then lived, was the issue of a mare owned by him, and was his property. Witness moved from Ellis county to Dublin, in Erath county, in the summer of 1881, taking the colt with him. Three months later he moved the animal described, with others, to Cow creek, in McCulloch county, Texas. The witness's son and his son's uncle placed witness's brand on the said animal, that brand being ML connected, under a half circle, on the left shoulder. The animal was an unmarked white mare, and was one year old when she ran on Cow creek. From Cow creek the animal drifted to Deep creek, in McCulloch county, a few miles from Cow creek, and took up and ran with a bunch of D. M. White's horses. Witness being satisfied with that range did not move her. White and others advised witness periodically about the animal. In the year 1884 the witness received information that the brand on his animal had been changed by the addition of a left hand curve to the bottom of the first stroke of the M, making the brand JML connected, with a half circle over it, and that a diagonal bar had been run through the letters, and that the figure 3 had been branded on the animal's left thigh. The 3 brand, curve and diagonal bar were fresh brands in 1884. In April, 1885, the mare was missed from her accustomed range. Witness then searched for the animal and found her at the house of John Criswell, the brother of this defendant, who is jointly indicted with him. The mare was then in John Criswell's yard, within a few feet of his door. Witness recognized her at a distance of one hundred yards. Mr. Pete Rem was with witness. Witness and Rem got off their horses and went to the mare and examined her, though witness knew her at once by her flesh marks, movement, size and shape. She was then branded half circle JML, connected, and barred across on the left shoulder, and the figure 3 and a circle within a circle and under bar on the left thigh, and had been marked with a split in each ear. At this time the bar across the 3, and circle in a circle with under bar brands were fresh. Witness at

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once took possession of his mare, took her home, and still has her. No one, so far as witness knows, has ever set up a claim to her since he recovered her. The animal described belonged to the witness, and was taken, without witness's consent, off her accustomed range, about April, 1885. John Criswell's wife and a boy were in the yard when witness took possession of his mare.

D. M. White testified, for the State, that he knew defendant and his brother, John Criswell, in 1884 and 1885. Defendant and John Criswell were partners and owned horse stock in the circle within a circle with under bar brand—the left thigh being the branding place. Defendant lived within two miles of witness, but his brother John lived several miles distant. Prior to and during 1884, and in the spring of 1885, a bunch of horses belonging to witness ran on Deep creek, in McCulloch county. During the spring of the last mentioned year, a gray mare branded ML connected, under a half circle, belonging to B. F. Rosser, ran with the witness's said bunch of horses on Deep creek. She was then between three and four years old. During the winter of 1884, the witness noticed that somebody had mutilated Rosser's brand on that mare by running a bar through it, and by adding a left hand curve to the first stroke of the M, and had fresh branded the figure three on the left thigh. Witness saw that mare on the range every day or two until about April, 1885. Some time after these changes had been made in the brand, the witness and defendant, in hunting horses together, came across this mare with some of witness's horses, and witness asked defendant if he knew who owned that mare. He replied that he did, and asked witness to permit her to run with his horses. After that, whenever defendant met witness he would ask about that gray mare, and always claimed her as his property. Defendant and his brother John claimed the figure 3 and the two circle brand. Witness missed the said mare from the range about April 10, 1886.

Rufus Jones testified, for the State, that in April, 1885, he met John Criswell in the road about two miles from and going towards his place. He was riding a gray mare about four years old, branded JML connected, under a half circle with a bar through it, on the left shoulder, and the figure 3 on the left thigh. Defendant and John Criswell were brothers and were partners in the stock business, and claimed the two circle horse brand.

Peter Rem testified, for the State, that in April, 1885, he went

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with Mr. Rosser to hunt his certain gray mare. They found her in the yard at the residence of John Criswell. She was then marked and branded in the manner stated by the witness Rosser. Witness and Rosser took the mare from John Criswell's yard, Mrs. John Criswell and a boy being present.

C. M. Rosser, the son of the prosecuting witness, testified, for the State, that he knew the animal described in the indictment, and, with the assistance of his uncle, he placed her in his father's brand when she was a colt. He saw her often when she ran on her range on Cow creek, and afterwards when she ran on the range on Deep creek. When he branded her, the witness remarked that, making a poor job of it, by making the brand wider than it ought to be, he would always know that mare. Witness also knew her by her flesh marks, and recognized her at once when she was brought home from John Criswell's by his father and Mr. Rem, although her brands had been changed in the manner stated by them, and her ears had been split.

The State rested.

Jake Lindley, the defendant's first witness, testified that he knew the two Criswells and D. M. White. He knew the stock and the brands of the Criswells when their stock ran on Deep creek, where D. M. White's stock ran. Witness lived on that range, and hunted it for stock during 1884 and 1885, and during that time he often saw two different white or gray mares branded with the figure 3 on the left thigh. Witness thought that each of those mares had other old brands on them, but could not be certain of more than that the 3 on each was the holding brand. Witness several times saw those two mares on the range, and once together with White's horses. The two animals were near but not quite of the same size. Hull was with witness once when he saw the two animals. Defendant told witness that the 3 brand on the left thigh was his, and that he claimed stock in that brand.

James Price testified, for the defense, that in 1884 and 1885 he lived in McCulloch county, about six miles distant from D. M. White's place, and during those years he hunted stock on the Deep creek range. On several different occasions during those years he saw two different gray mares on that range, both of which were branded 3 on the left thigh. They were not exactly alike, one being a lighter gray, and very near white, and the other very near an iron gray, with brown legs, mane and tail. Defendant and R. C. Russell both claimed the 3 on the left thigh

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brand. R. C. Russell moved to New Mexico in the spring of 1884, and, so far as witness knows, still lives there.

The defendant's motion for continuance set up that defendant expected to prove by one Bobo, if awarded a continuance to produce him, that one R. C. Russell claimed the mare alleged to be stolen; that said mare was branded with the brand commonly known as R. C. Russell's brand; that for two years before her alleged theft the said mare ran with the said Russell's horses, and that, prior to the alleged theft, the said Russell, in the presence of the said Bobo, sold the said mare to John Criswell, the defendant's brother and partner. By the absent witness Cochran, the defendant expected to prove that he, Cochran, heard R. C. Russell claim the mare involved in this prosecution, and offer to sell her to John Criswell.

Burleson & Harris, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Appellant and his brother, John Criswell, were jointly indicted for the theft of a mare, the property of one Rosser. They severed at the trial, and this appellant was put first upon trial and was convicted. The inculpatory evidence against this defendant was that he and his brother John were partners in the stock business, and owned a joint brand, which brand was placed by some one upon the animal in question, and at the same time the brand of Rosser, which was upon her, was defaced and altered; that the mare ranged with the stock of one White, who lived within two miles of appellant, that appellant and his brother John frequently hunted stock in said range, and that, after the mare was put into their brand as above stated, this appellant claimed the mare as his and frequently asked White how she was doing. This change of the brands was made in the fall of 1884, and the animal was taken from her range and recovered by Rosser from the possession of John Criswell, appellant's co-defendant, in May, 1885. No explanation as to the character of their claim to and possession of the animal was made by either of the defendants. There does not, however, appear to have been any attempt on the part of either, and especially this appellant, to conceal the fact that he or they did claim the animal.

Before announcing ready for trial, the appellant made a

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motion for a continuance, which was overruled, the purpose of which was to prove by the absent witness that one Russell owned and claimed the mare, and had sold her to the co-defendant John Criswell.

On his trial this appellant proved by two witnesses that there were in fact two gray mares, resembling each other and branded in the same "holding" brand, running on the same range together, near White's, and that this "holding" brand was this appellant's and Russell's.

Evidently the defense, so far as this appellant was concerned, was, that the mare was taken by mistake; that when defendant told White the mare was his and asked White to look after her, he, appellant, was alluding to and speaking of the Russell and not the Rosser mare, and that in truth and in fact he had never intended to assert a claim of ownership in but the Russell mare. His defense being a mistake of fact, the court should have submitted that issue to the jury by proper instructions, which was not done. In support of his defense, when the evidence which he adduced at the trial was again considered in connection with his application for a continuance on the motion for a new trial, we think it apparent that the court should have granted the latter motion.

The judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

Opinion delivered February 1, 1888.

No. 2432.**ISAAC GRAY v. THE STATE.**

1. **PRACTICE—WITNESS**—It is expressly provided by statute that "persons charged as principals, accomplices or accessaries, whether in the same indictment or different indictments, can not be introduced as witnesses for one another."
2. **SAME—THEFT—RECEIVING STOLEN PROPERTY, KNOWING IT TO BE STOLEN** is, under the law of this State, a separate and distinct offense from theft, and a party indicted for theft can not, under that indictment, be convicted of receiving stolen property, knowing it to be stolen.

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3. **SAME—ACCESSARY.**—Subdivision 2 of article 87 of the Penal Code provides that "relations in the ascending or descending line by consanguinity or affinity can not be accessaries."
4. **SAME—EVIDENCE—CASE STATED.**—On his trial for theft of lost property, the defendant offered one Nancy Gray as a witness in his behalf. The State objected to the competency of the proposed witness upon the ground that a separate indictment was pending against her, wherein she was charged with receiving and concealing the stolen property for the theft of which the defendant was on trial. The objection was sustained by the trial court. The evidence disclosed that the proposed witness was the mother of the defendant. In view of the rules above announced, it is *held* that, inasmuch as the witness was not charged as a principal, accomplice or accessary in the *theft*, she was a competent witness, and the trial court erred in holding her incompetent.

APPEAL from the District Court of Brazos. Tried below before the Hon. John N. Henderson.

The conviction in this case was for the felonious theft of money, and the penalty assessed against the appellant was a term of two years in the penitentiary.

Otto Oldham was the first witness for the State. He testified that he lived in Burleson county, Texas. On or about December 20, 1886, he went to the town of Bryan, in Brazos county, taking with him four bales of cotton, which he sold. The money he received for the cotton he placed in his pocket book, and he placed his pocket book in the side pocket of his coat. He did this, he thought, in Mr. Koppe's store. The money, together with some his brother gave him to take home, amounted to one hundred and thirty dollars in United States currency, the bills being of the denominations of five, ten and twenty dollars. Having placed his pocket book and money in his pocket, the witness got on his horse at Koppe's store and started home. When he had traveled a mile or a mile and a half on his way home, the witness missed his pocket book and money, and went back to town to look for it. He inquired for it at Koppe's store, and, aided by others, looked for it about those premises. Failing to find his property at Koppe's, he went to Garth's gin and warehouse where he thought he might have dropped it, but he failed to find it at either of those places. Witness then went home, and returned to Bryan on the next day, when he reported his loss to City Marshal Carr and Policeman Bishop, who, during the course of the day, returned to the witness ninety dollars in United States bills of denominations corresponding with some of those

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lost by witness. Those bills looked like some of the bills lost by witness, but witness could not positively identify them as the same. The money returned to the witness by the police officers was taken by them from the defendant. Policeman Bishop was the officer who returned the ninety dollars to witness. Witness could neither read nor write, but could tell the value of a United States currency bill by the figures on the same.

Cliff Harris testified, for the State, that he lived in the town of Bryan, and was a clerk in Mr. Koppe's store. He knew Otto Oldham, who, on or about December 15, 1886, in Koppe's store, showed him some United States currency notes or bills. Witness saw Oldham put that money in his pocket book, and, according to his recollection, Oldham then placed the pocket book in the right hand side pocket of his coat. About an hour after he left the store he, Oldham, returned and said that he had lost his pocket book and money. Witness helped Oldham hunt for the money about the store, but they failed to find it, and Oldham left. He returned the next morning, and witness advised him to consult the police about his loss. The defendant, on the day of Oldham's loss, was working about Koppe's store. Shortly after Oldham left, after returning to the store and reporting his loss, the defendant left, going out at the back door. Witness told the porter to call him back, which the porter did, but defendant did not stop, nor did he ever come back to get his pay.

A. B. Carr, city marshal of Bryan, in December, 1886, testified, for the State, that some time during that month the prosecuting witness, Oldham, reported to him that he had lost a pocket book containing some money. Witness then learned that the defendant was seen to have a five dollar bill on the evening before, and he sent Policeman Bishop after him. Bishop brought the defendant to witness, and witness had a talk with him about Oldham's money. Witness thought that defendant admitted that he found some money on the evening before. Witness told defendant that he had better go and get the money, and that he thought it would be all right if he would produce the money. Defendant and Bishop then went off and soon returned together, bringing ninety dollars in United States currency. Defendant then told witness that he had spent a part of the money he found. The sum he claimed to have spent, added to the ninety dollars he returned, amounted to within eight or ten dollars of the amount Oldham claimed to have lost. Witness was not sure

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that defendant claimed to have found the money, but such was his impression.

J. M. Bishop testified, for the State, that, in December, 1886, he was a member of the police force of the town of Bryan. During that month he was called upon to assist Mr. Oldham in his search for his lost pocket book and money. Witness took the defendant to Marshal Carr, and, after Carr's interview with defendant, he took defendant to the house of his mother, one Nancy Gray. Nancy was not at home, but was soon found at the house of a neighbor. Before Nancy was called, the defendant looked in a trunk, but failed to find the money. Nancy was then brought to the house, and defendant told her to get the money he had given her. Thereupon Nancy thrust her hand into a pocket in her underskirt and produced ninety dollars, which she handed to witness. The witness after counting the money asked the defendant where the pocket book and papers were. Defendant made no reply to this question, but his mother, the said Nancy, replied either that she had burned them or that she had advised the defendant to burn them, witness could not remember which. Defendant at that time was not in arrest, but had accompanied the witness to Nancy's house of his own free will and accord. Defendant surrendered the ninety dollars willingly, and told witness that he found it on one of the streets of Bryan.

The State rested.

Frank Ellis was the first witness for the defense. He testified that, on the day Oldham was said to have lost his money, he, witness, was at work at Koppe's store. Witness saw the finding of the money by the defendant, at the back of Koppe's store. He saw the defendant stoop, pick up something, and then cross the ditch which was at the rear of said store. Witness then asked him what he had found. Defendant made no attempt at concealment, but replied at once that he had found some money. The witness at that time was stacking oats at the rear of Koppe's store, about ten feet distant from the building. He did not see the object picked up by defendant, and could not say that it was or was not a pocket book. This was on Friday. Witness said nothing to Mr. Harris about seeing the defendant find the money, though he saw Harris and Oldham hunting for lost money. Witness saw Oldham before defendant found the money. Oldham passed out of the back door of Koppe's store, crossed the ditch about where the defendant afterward found the money,

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mounted his horse and started home. He appeared to be drunk. Defendant was at that time working about Koppe's store, and was in as good a position as the witness to see Oldham when he left Koppe's store, crossed the ditch, mounted his horse and rode off.

Jerry Simpson testified, for the defense, that defendant was not hired to work at Koppe's store on the day that Oldham lost his money. Witness was at the said store on that day, and was there when Oldham came back and looked for his money. Frank Ellis helped him look for it.

The defense closed.

The motion for new trial raised the question discussed in the opinion.

J. A. Buckholts, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Appellant was charged, tried and convicted in the lower court for the theft of money over the value of twenty dollars, the property of one Otto Oldham. As made by the evidence the case was one of theft of property which had been lost by the owner.

There is but one bill of exceptions in the record. Defendant proposed to introduce as a witness in his behalf one Nancy Gray, to whose competency the district attorney objected because the said witness was indicted in the district court and was being prosecuted for receiving and concealing the same money stolen by defendant and for which he was on trial, knowing it to have been stolen; and in support of the objection produced the indictment. The court sustained the objection and excluded the witness.

Our statute expressly provides that "persons charged as principals, accomplices or accessaries, whether in the same indictment or different indictments, can not be introduced as witnesses for one another." (Code Crim. Proc., art. 731.) Under repeated decisions of this court, receiving stolen property knowing it to be stolen is a separate, distinct and substantive offense from theft, and a party under an indictment for theft can not be prosecuted and convicted for receiving stolen property knowing it to have been stolen. (Penal Code, art. 743; *Brown v. The State*, 15 Texas Ct. App., 531; *Gaither v. The State*, 21 Texas Ct. App., 527.)

Syllabus.

There is no claim that Nancy Gray was a principal or an accomplice in the theft. (Penal Code, arts. 74 and 79.) She was defendant's mother, as shown by the evidence, and, though the crime with which she was charged would come near to bring her within our statutory definition of an accessory (Penal Code, art. 86), she was not and could not be an accessory in the crime on account of the fact that she was defendant's mother. It is expressly declared by statute, that "relations in the ascending or decending line by consanguinity or affinity can not be accessories." (Penal Code, art. 81, sub div. 2.)

If she was not charged as a principal, accomplice or accessory in the theft, then she was a competent witness. We think it clear that she was not so charged, and that the court erred in holding her incompetent.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered February 1, 1888.

No. 2347.

STEVE BLAKELY v. THE STATE.

1. **ACCESSARY—INDICTMENT.**—See the opinion for an indictment held sufficient to charge the accused as an accessory to murder, as accessory is defined by article 86 of the Penal Code.
2. **SAME—DEFINITION.**—"An accessory is one who knowing that an offense has been committed conceals the offender or gives him any other aid in order that he may evade an arrest or trial or the execution of his sentence. But no person who aids an offender in making or preparing his defense at law, or procures him to be bailed though he afterwards escape, shall be considered an accessory." It is not essential under this definition that the aid rendered to the criminal shall be of a character to enable the criminal to effect his personal escape or concealment, but it is sufficient if it enables him to elude present arrest and prosecution. The facts upon which the indictment in this case was based were that immediately after the commission of the homicide by the principal he and the defendant had a retired private consultation, after which the principal mounted a horse and disappeared, and the defendant charged the only two other witnesses present to testify on the inquest to a statement fabricated by himself, to the end that, upon final trial, the principal might be acquitted or released on nominal bond. *Held*, that such facts would constitute the defendant an accessory within the purview of the statute.

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3. **SAME.**—That the facts above stated, if proved, would constitute the offense of subornation of perjury, would not defeat the prosecution of the accused as an accessory to murder.
4. **SAME—ACCOMPLICE TESTIMONY.**—Under the rules of practice obtaining in this State, a conviction can not be had upon the testimony of an accomplice unless it be strongly corroborated by other evidence; and an accomplice can neither corroborate himself nor another accomplice. Another rule is that if a witness implicates himself in the offense it is immaterial that he claims to have been coerced—no matter what his motive, if he agrees to and does participate in the offense, he is an accomplice or *particeps criminis*.
5. **SAME—CASE STATED—FACT CASE.**—The issue in this case was whether the defendant fabricated the narrative of the homicide committed by his principal, which was related upon the inquest over the deceased by the witnesses who testified against him on this trial. That issue was supported only by the uncorroborated testimony of the two witnesses who claimed that they testified to the fabricated statement upon the inquest because commanded to do so by the defendant, and because they were in fear of the defendant and his principal. *Held* that, in the absence of corroborating testimony, the evidence is insufficient to support this conviction.

APPEAL from the District Court of Falls. Tried below before the Hon. Eugene Williams.

The indictment in this case charged the appellant as an accessory to the murder of D. Daffin, by Erasmus May in Falls county, Texas, on the third day of July, 1884. The trial of the appellant resulted in his conviction, and his punishment was assessed at a term of five years in the penitentiary.

It was fully proved, and not controverted, that the deceased, D. Daffin, was shot and almost instantly killed by Erasmus May, at a hay camp, in Falls county, on the day alleged in the indictment. Deceased's father testified that deceased, at the time he was killed, was about twenty-one years old, well grown and stout, and weighed about one hundred and seventy-five pounds. Witness reached the hay camp an hour or two after the killing, and found the body of deceased lying on his back, near the cook house, and about thirty feet from the tent. Deceased's right hand lay across his breast, with a knife lying loosely in it. It was a pocket knife, with a blade open and about three inches long. Witness saw no blood on the knife. The body was not moved while witness remained. Of his own knowledge the witness could not say who killed his son. There was but one wound

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on the body. It was a gun shot wound, and the ball entered below the left nipple and passed directly through the body.

Doctor Whatley, for the State, testified that he was a brother-in-law of the deceased, and reached the latter's body after life was extinct. He noticed a knife in the deceased's hand, which was lying across his body. There was no blood on the knife. Witness believed that the deceased, if he had the knife in his hand at the time he was shot, would have dropped it instantly. Shot as he was, any man would have instantly dropped anything in his hands.

N. Stallworth, for the State, testified that he was a justice of the peace of Falls county, in 1884, and he was notified of the killing of the deceased on the morning it occurred. He summoned a jury of inquest and went to the scene of the homicide, reaching there about ten or eleven o'clock in the forenoon. A number of people were there, and among them were defendant and Frisby Henderson and Alf. Nelson, but May was not there. The body of the deceased lay upon the back, with one hand by his side and the other across his breast, with a knife, not grasped, but lying in it loosely between his fingers and body. The point of the knife was down, and was caught in a fold of deceased's shirt. Witness could not say whether the body had been moved; there were no marks indicating that it had, and he saw no blood except where it lay. There was but one wound on it, and that was where a ball had entered below the left nipple and passed straight through the body. Defendant, Frisby Henderson and Alf. Nelson testified at the inquest. The proceedings at the inquest were handed to the district clerk by witness, and he had not seen them since, nor could he say where they were. There was no blood on the knife. The body lay about twenty feet from the tent, with the feet pointed diagonally towards the mouth of the tent. The wire cutter was thirty or forty feet from the tent, and the wagon about the same distance. A mesquite tree stood about five feet from the southeast corner of the tent, which was about eight or ten feet long by five or six in width. Frisby Henderson, Alf. Nelson and defendant testified before the jury of inquest, and their statements were substantially the same, and favorable to May. In effect, their testimony was that, on the morning of the killing, the deceased (who was the foreman of the party) came to the hay camp and told Alf. Nelson to go and catch the mules, which were grazing some distance away. Nelson started off, and deceased ordered May to help Nelson catch

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the mules. May tried to find a rope, but could find none, and so told the deceased, who immediately said to May: "You G—d d—d son of a bitch, I'll make you make a rope," and ran to the wagon and assaulted May with a knife, cutting May's shirt in two places before May could get out of his reach. May then ran around the tent, the deceased pursuing and cutting at him with his knife, and, as May ran by the tent, he snatched a pistol from the tent, and while in a stooping position pointed the pistol around his left arm, without rising to an erect position, and fired back as he ran, the ball taking effect in the body of the deceased. The deceased then stopped, stepped back a few steps and sat down, lay back and died in about ten minutes. Defendant, after saddling a horse, left camp to go for Mr. Mark Harwell, for whom the deceased and the others were cutting hay. The jury of inquest returned a verdict of justifiable homicide, and no warrant was then issued for the arrest of May. A few days after the inquest May voluntarily surrendered, and witness put him under a nominal bond to await the action of the grand jury. May complied with the bond, but the next grand jury found no indictment against him. He had not left the county, so far as witness knew, but was out of the way when the inquest was held.

Frisby Henderson testified that he was cooking breakfast; May and Alf Nelson were sitting down by the tent, when the deceased rode up and said, "Frisby, is breakfast done?" Witness told him it was. He said witness never had enough bread, and to cook more. He spoke to Nelson and said, "Alf, go and get up the mules; old Blue will be gone to hell in a minute." He then told May to go and help Alf get the mules. Alf went on, and May still sat there, and said he had no rope. Deceased rode to a tree and tied his horse, and then went to the wire cutter, some twenty steps southeast of the tent, and commenced cutting wire. Directly he again told May to go and help Alf get the mules. May replied that he had no rope, and that, by God, he didn't have to make one. Deceased then turned from the wire cutter, and, walking toward May, said: "You God d—d son of a bitch, I'll make you make a rope." Deceased had nothing in his hand; witness was standing where he could see. When deceased got in about ten steps of May, the latter reached down under the northeast corner of the tent and got Mr. Harwell's six shooter pistol, which was kept at the camp, and he leveled it at the deceased. Deceased stopped, and he and May looked at each other some time, neither of them speaking, when May fired, and de-

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ceased turned and walked back and a little past where witness was standing, and then lay down on his back. May, with his pistol, followed the deceased, and said: "Oh, yes, God d—n you, I've got you." He walked up to deceased with the pistol in his hand, and the deceased said: "Don't shoot me any more." May did not try to shoot any more, but stood there until the deceased died, and then put his hand into deceased's pocket, took out deceased's knife, opened it, and cut his own shirt in two places, crosswise. Deceased had one of his legs drawn up, and was left in that position by the defendant. After May cut his own shirt, which was a very close fitting white knit undershirt, he and Steve Blakely, this defendant, stepped aside and had a talk, which the witness could not hear. Then May saddled the pony which was worked to the hay rake and rode off toward Gassoway's pasture. After he had gone, defendant came to witness and Alf Nelson and told them what statement they must make about the killing. The witness then proceeded to give the statement which defendant said must be given. In substance it was the same as the version given by the previous witness, Stallworth, of the testimony of defendant, Henderson and Nelson at the inquest held over the body of the deceased. Defendant told the witness and Nelson that nobody would know any better, and that, if they would swear to that statement before the inquest, the jury would clear May or would release him on nominal bail. Witness agreed to make the statement, and he swore to it before the jury of inquest, and once before the grand jury. He was afraid not to swear to it; he was afraid of the defendant and May. He was afraid May would kill him like he had killed the deceased if he did not swear it. When May killed the deceased, Alf Nelson was off after the mules, but he came up pretty soon, and, while some distance off, he asked what was the matter. Witness told him that Erasmus May had shot Mr. Daffin. Nelson commenced hallooing and started to run off, but defendant called him and he then came up. Soon after the shooting, defendant got on the deceased's horse and went after Mr. Harwell. What the witness has sworn to at this trial is the truth, and his reason for previously swearing differently was because he was afraid of violence from the parties concerned. Witness had never talked to May about this matter.

Hugh Barnett, for the State, testified that he was a member of the coroner's jury which investigated the cause of the deceased's death. The jury of inquest did not make a close examination of

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the ground nor make any measurements. They exonerated May on the testimony of the three negroes, Henderson, Nelson and Blakely, which has already been stated in Stallworth's testimony.

Alf. Nelson, for the State, testified that he went for the mules when told by the deceased to do so, and he got them across a ridge and out of sight of the hay camp, when he heard a pistol fire and went up on the hill to see what was the matter. Just as he got in sight, Frisby Henderson hallooed to him, saying that May had shot the deceased. This frightened the witness, and he commenced to halloo, and ran towards home, when defendant hallooed to him, and he stopped, and then turned around and went towards the camp. Daffin was dead when witness got back to camp. Witness saw no one go up to the deceased, and did not see May get the deceased's knife out of his pocket. When witness, after he started back, first saw May, the latter was saddling the rake horse, which he afterwards rode off. Witness heard only one shot. Witness did not go nearer than fifteen or twenty feet of the body, and May had then ridden away. Defendant Blakely took the witness and Frisby Henderson off to one side, and told them what they had to swear. At first the witness declined to swear to it, and defendant threatened him if he did not, and said that nobody would ever know the difference. He said that, if witness did not swear what he told him, he, the witness, would be apt to come up with the "bell off." Witness was scared, and agreed to swear it. Witness gave the substance of what he was required to swear, as the same in detail has already been set out in Stallworth's testimony, and as he did testify before the coroner's jury. May was not under arrest at that time. Witness was now telling truthfully all he knew about the killing. Of his own personal knowledge, he could not say who fired the fatal shot, and all he knew about the shooting was what he was told by defendant and Henderson.

Nelson Denson, for the State, testified that he saw Erasmus May on the streets of Marlin, a few days after the killing, and heard him talking about it. He was wearing a white knit undershirt, which he said he had on the day he killed Mr. Daffin. He then showed to witness the places where his shirt was cut. Witness noticed them closely. One was in the side, and the other across the back, and both ran crossways of the body. The shirt fit May very closely, and witness looked for cuts in his skin, but could not see where the skin was even grazed. In the witness's

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opinion, the shirt could not have been cut while on May, as he represented, without cutting the skin, as it fit so close.

The State next introduced in evidence the indictment against Erasmus May for the murder of D. Daffin, and the case was closed.

Alexander, Winter & Dickenson, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. This is a companion case to *Erasmus May v. The State*, 23 Texas Court of Appeals, 146.

In the first count the indictment charges May with the murder of Derush Daffin, and in the second count the charge as set forth against this appellant is that "after the commission of the aforesaid offense of murder by the said Erasmus May, as aforesaid, and well knowing the said Erasmus May to have committed said offense, Steve Blakely (the defendant) did then and there unlawfully, willfully and feloniously, conceal and give aid to the said Erasmus May, in order that he, the said Erasmus May, might evade an arrest and trial for said offense; and so the grand jurors aforesaid, upon their oaths aforesaid, do say that he, the said Steve Blakely, did then and there become and make himself an accessory to the murder and killing of the said Derush Daffin by the said Erasmus May, in the manner and form as aforesaid, contrary," etc. The indictment sufficiently charged the offense (Willson's Crim. Forms, No. 539, p. 232) under article 36 of the Penal Code, which defines the crime in the following language, viz: "An accessory is one who, knowing that an offense has been committed, conceals the offender or gives him any other aid in order that he may evade an arrest or trial, or the execution of his sentence. But no person who aids an offender in making or preparing his defense at law, or procures him to be bailed, though he afterwards escape, shall be considered an accessory."

At appellant's trial in the court below, the matters proved in behalf of the prosecution to establish the crime alleged were objected to by defendant both as irrelevant and insufficient to the issue. It is insisted that the facts permitted to be proven did not go to show either that defendant concealed May, or that he gave him aid such as to enable him to evade an arrest or trial.

In brief the facts proven were that, immediately after the

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homicide, this defendant and May went off to themselves and had a private conversation, after which May mounted a horse and rode off. Defendant Blakely then told the only other two parties who were present that they must swear before the coroner's jury to a certain state of facts which he then and there detailed, and that if they did so it would appear to said jury, and they would so find, that May was justifiable in self defense in killing Daffin, and he would either be exonerated entirely or put upon a very light bond to answer the charge. Acting upon these suggestions, and through fear of May and defendant, the two witnesses did, at the coroner's inquest, swear, as did also Blakely, to the fabricated statement of the occurrence as devised by Blakely, and the result, as anticipated by Blakely, was that May was subsequently placed under a nominal bond, and that the grand jury for several terms of the district court thereafter failed to indict him for the murder, and he was only indicted after it leaked out and was ascertained that the testimony given by the witnesses at the inquest was false and perjured. On May's trial under indictment for the murder the two witnesses who had sworn on the inquest to the fabricated statement of Blakely, testified that they had sworn falsely, and developed the reasons and inducements causing them to do so. They also stated, as they declared truthfully, the facts attendant upon the homicide as they actually did occur, and upon this their testimony, corroborated as it was by other evidence, May was convicted of murder of the first degree, and his punishment was affixed by the verdict and judgment of the court at a term of seventy-five years in the penitentiary; which judgment on appeal was afterwards affirmed by this court. (23 Texas Ct. App., 146.)

It is perhaps necessary that we should further state that, after the conversation between May and defendant immediately following upon the killing, and after he had mounted a horse and ridden off as above stated, May did not appear at the coroner's inquest, nor was he seen for a day or so thereafter, until his appearance before the justice of the peace to enter into the nominal bond for his appearance above mentioned.

On this appellant Blakely's trial as accessory, the two witnesses also testified as in May's case to the facts with regard to the fabricated testimony at the inquest, and to the facts as they really occurred.

The objections presented to this testimony are thus stated in the able brief of counsel for appellant, viz:

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"We submit that under our statute the "aid" given to an offender which the law denounces, is something which relates to the personal conduct of the offender after the offense, or an aid which obstructs the operation of the law in its executive branch, such as concealing the person of the offender, or advising him how to escape pursuit; furnishing him means to make his flight; putting persons in pursuit off the track, and not an aid which causes justice to slumber, or perverts its course, such as compounding with a felon, concealing the transaction either by silence or by perverting the facts so as to make that appear innocent which in truth is not."

Mr. Bishop says "the true test whether one is an accessory after the fact is whether what he did was by way of personal help to his principal to elude punishment, the kind of help being unimportant." (1 Bish. Crim. Law, 7 ed., sec. 695.) Mr. Wharton says: "Any assistance given to one known to be a felon, in order to hinder his apprehension, trial and punishment, is sufficient, it is held, to make a man an accessory after the fact." (1 Whart. Crim. Law, 8 ed., sec. 241.)

We are of opinion the facts we have stated, and upon which this case rests, bring it within the purview of the general law and our statute, *supra*, as to accessories. Appellant, if he did not in fact conceal May until the perjured testimony was given which justified him before the inquest, certainly aided him to the extent that he was not arrested and punished for his crime until the perjury was discovered, and but for the discovery the aid which defendant attempted to give him would have proven effectual in affording him perfect and complete immunity from apprehension, trial and punishment for the murder he had committed.

It is true that, under the facts disclosed, defendant might have been prosecuted and convicted under our statute for subornation of perjury (Penal Code, art. 199), but this fact did not destroy nor affect his relation to the murder as an accessory: it was simply a question with the prosecution as to which of the offenses he should be tried for. We have discussed this branch of the case thus lengthily because of the fact that our statute as to accessories has never before been directly construed. The disposition of the case, however, on this appeal must turn upon another question.

The main issue in this case, in so far as this defendant was concerned, is, did defendant fabricate the testimony, and did he

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induce the two witnesses, Nelson and Henderson, to swear to the same before the coroner's inquest? This question is the all-important one, and it is the primary one requisite in the establishment of his guilt as accessory to the murder. Without that essential fact being ascertained positively and conclusively, his guilt is not established.

Now, it is in proof that defendant and these two witnesses were alone present when the matters transpired with regard to the fabricated statement about which they have testified; that is, that he told them what they should swear, and induced them to swear it. In agreeing to do so and in doing so, no matter what the motive, they made themselves accomplices, or *particeps criminis* in the offense which was committed by their false testimony. If a witness implicates himself, it is immaterial that he claims to have been coerced. (Davis v. The State, 2 Texas Ct. App., 588; Freeman v. The State, 11 Texas Ct. App., 92.) Our statute declares that "a conviction can not be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." (Code Crim. Proc., art. 741.)

It is well settled that a conviction can not be had upon the uncorroborated testimony of two or more accomplices. (Roberts v. The State, 44 Texas, 119; Carroll v. The State, 3 Texas Ct. App., 117; Heath v. The State, 7 Texas Ct. App., 464.) One accomplice can not corroborate himself (Hannahan v. the State, 7 Texas Ct. App., 664), and the evidence of one accomplice can not be corroborated by that of another. (Heath v. The State, 7 Texas Ct. App., 464; Gonzales v. The State, 9 Texas Ct. App., 374; Phillips v. The State, 17 Texas Ct. App., 169.)

Outside the accomplice testimony of the two witnesses, there is no evidence that defendant fabricated and procured and induced them to testify to the same on the coroner's inquest. No one else was present and heard him tell them so, or saw him when the purported statement was made to them by defendant, or saw the parties together and under circumstances which would go to corroborate their testimony on this trial as to that fact.

On May's trial, the physical facts proven by other witnesses and other evidence directly contradicted and disproved the evidence at the coroner's inquest, and corroborated these accomplices in swearing that that evidence was untrue and that what they testified criminating May on the trial was true. But that

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was a different case and a different issue from the one here presented. It is absolutely essential to the guilt of defendant in this proceeding that it should be proven that he told them what to swear and induced them to swear it. Proof that it was false amounts to nothing if the first proposition be not established; because they might have sworn falsely of their own motion, and for aught that appears they might have persuaded defendant to do so, and in either event defendant would not be guilty. The fact that the defendant himself swore on the coroner's jury as they did does not amount to a corroboration of their statement that he induced or made them swear as they did.

Under the law and the evidence, we are constrained to hold that the case against the appellant is not established with that certainty which would authorize us to permit it to stand as a precedent, because the accomplice testimony, upon which the conviction rests, has not been corroborated; wherefore the judgment must be reversed and the cause remanded.

Reversed and remanded.

Opinion delivered January 11, 1888.

No. 2628.

JOE N. BLAIN v. THE STATE.

1. **PRACTICE—EVIDENCE.**—It is an established and statutory rule of evidence in this State that "persons charged as principals, accomplices or accessaries, whether in the same indictment or in different indictments, can not be introduced as witnesses for each other." Under this rule the declarations of a principal co-defendant were, in this case, properly excluded, they being no part of the *res gestæ*.
2. **PRINCIPALS—CHARGE OF THE COURT.**—See the statement of the case for a charge of the court upon the doctrine of principals in crime *held* correct.
3. **THEFT—FACT CASE.**—See the statement of the case for evidence *held* sufficient to support a conviction for theft.

APPEAL from the District Court of Gonzales. Tried below before the Hon. George McCormick.

The conviction in this case was for the theft of five head of

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cattle, the property of John Jobe, in Gonzales county, Texas, on the sixteenth day of April, 1887. G. C. Barber was jointly charged in the indictment, but the defendant was alone upon trial. A term of two years in the penitentiary was the penalty assessed against him.

John Jobe was the first witness for the State. He testified that he lived in the town of Gonzales, Texas. He owned a pasture across the Guadalupe river from said town and about two and a half miles distant from it. Some time in the spring of 1887 he missed several head of red roan cattle from his said pasture. They were branded JOB on the left hip. Tom Terry was in charge of the pasture fence, and attended to the branding of witness's cattle. The animals missed by witness were two year olds. The animals he sold Barber were "long twos," except one, which was a three year old. On his cross examination the witness said that his pasture contained between a thousand and twelve hundred acres of land. He should have about two hundred and fifty head of cattle, counting all grades, in that pasture. In March, 1886, the witness sold twelve head of cattle to G. C. Barber, eleven of them being two year olds and one a three year old. Some of them were red and some were spotted, but none, as well as witness could remember, were roan. At the time that he bought the twelve head of cattle, Barber put them in the 7 brand. It was understood at the time the twelve animals were sold to Barber that he was to feed and ship them. The witness would not have sold the cattle without that understanding. He had often refused to sell cattle in his brand to be kept in the country. The witness would not swear that the cattle he missed from his pasture were stolen, but he had never seen them since they disappeared from his pasture. The witness never saw the cattle found in Houston's pasture, of which pasture defendant had charge.

Tom Terry was the next witness for the State. He testified that for four years he had been in the employ of John Jobe, keeping up his pasture fence, and branding his cattle. About April 1, 1887, the witness missed some cattle from Jobe's pastures. Some of the animals missed were of a red color, and some were roan. Late in April, witness went to the Murray pasture, about twenty-five miles from Jobe's pasture to get a steer. In the Murray pasture he found two of Jobe's roan two year old animals, both being branded JOB. Witness knew those animals well, having milked their mothers, and he knew

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that they were not of the twelve animals sold by Jobe to Barber. The two Jobe cattle were fresh branded on the ribs, the fresh brands being, as well as witness could remember, the letters OL. The two animals were with the four year old steer which Barber bought from Jobe as a three year old in 1886. On his cross examination the witness stated that he was not present when the animals sold by Jobe to Barber were delivered to the latter.

W. E. Jones, sheriff of Gonzales county, testified, for the State, that, in April, 1887, a search warrant was placed in this hands directing him to search several pastures, among them the one known as Murray's, for cattle in the JOB brand, belonging to John Jobe. Defendant had charge of the Murray pasture. Witness reached that pasture early on one Saturday morning, late in April, and met the defendant in the pasture. Witness explained his business to defendant, and defendant in reply said that he had but one JOB animal in the pasture, which, he said, he got from Barber. He said nothing about having purchased a number of JOB cattle from Barber. He simply referred to the four year old steer in the JOB brand. Witness searched the pasture until eleven o'clock without finding a single animal in the JOB brand. The pasture contained about one thousand acres, and was searched carefully by witness and his ten or twelve assistants. After searching the pasture witness started his men off to arrest certain parties, and, with John Jobe, rode himself back to Gonzales. The Murray pasture was in Gonzales county. A lane separated it from the Houston pasture, which was across the line in Karnes and Wilson counties.

W. F. Campbell testified, for the State, that he was a constable of Gonzales county, and acted as deputy sheriff under Sheriff Jones. Late in April, 1887, Sheriff Jones directed witness to meet him with some men at the Murray pasture, for the purpose of searching it. Witness went with a posse of men to that pasture on Friday evening, and camped that night in the pasture. On the next morning John Jobe and Sheriff Jones arrived, and Jobe described two animals for which he wanted search made. He described them as two speckled roan two year old steers, branded JOB on the hip. The search was made but no JOB cattle were found. The pasture contained a number of cattle branded OLO on the side. After the search was completed Sheriff Jones despatched the witness and the other men to a point about eight miles distant, to arrest a negro. In passing

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through a lane which separated the Murray pasture from other pastures, which point was on one side of J. D. Houston's pasture, the witness and his party found a bunch of six or seven head of cattle. That point was between four and five miles distant from Murray's pasture. Of the cattle mentioned, two were speckled roan two year olds, branded JOB, corresponding with the description of the animals given by Jobe. Two were red two year olds, branded JOB. One was a large four year old steer, branded JOB, and another was a yellow or brown steer. The two year old steers were branded, besides the JOB brand, in the OLO brand. Christie McCoy, L. S. McCoy and John Bishop were with witness when he found the cattle. Having looked at the cattle, the witness and his party went into the Knowles pasture, near by, to "noon it." When they finished their noon they returned to the lane, but meanwhile the cattle had moved. The party then moved up the lane about three quarters of a mile, where they again found the same animals. About that time the defendant rode up from the inside of the Houston pasture, and asked witness if he had found any thing that he wanted, to which question the witness made no reply. He asked it again, and witness replied: "I will tell you later." The defendant left at once, and witness and his party drove on towards Rancho, sending L. S. McCoy to overtake Sheriff Jones and Jobe. Before the party reached the place in Houston's pasture where defendant lived, the defendant and James King came down the lane, both armed with pistols, and overtook the party. As they rode up, defendant asked witness what he proposed to do with the cattle. Witness replied that he did not yet know, but that he had sent for Jones and Jobe to identify the cattle. Defendant replied that the cattle belonged to him, and that, "by God," witness should not drive them away. Defendant talked in a hostile manner for a while, but quieted down after witness gave him to understand that he and his party were going to hold the cattle until the arrival of Jobe. Witness then drove the cattle to the J. D. Houston pens, near which the defendant lived. About that time he learned that Jones and Jobe had returned to Gonzales. Defendant then told witness that he had purchased the cattle from Clarke Barber, and proposed, if witness would leave them at the pen, he would provide grass, grub and water for them, and witness left the cattle in the pen. Witness and his party returned to the pen for the cattle on the following Tuesday, but did not find them. They saw defendant, who told

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them that he had turned the cattle out. The witness and his party then searched the pasture for three or four hours, but, finding only the four year old steer, they abandoned the search. The point at which the cattle were first found was in a lane, on one side of which there was a pasture (not the Houston or Murray pasture), in the fence of which there were many gaps, through which cattle came and went. That pasture also had gates at the lower end, and was in Karnes county. The OLO brand on the cattle appeared to be about three or four weeks old. When witness called for the cattle on Tuesday, and asked defendant where they were, he said that they were some where in the pasture, but did not proffer to help hunt for them. Witness was positive that all of the animals found by him and his party in the lane, save two, were two year olds. The Houston pasture was a large one, but witness did not know how many acres it contained. It was in Wilson county. Defendant was in the Murray pasture when that pasture was searched for the cattle. Witness did not see the 7 brand on any of the animals except the four year old steer.

Christie McCoy testified, for the State, substantially as did the witness Campbell, and in addition said that he was a stock man of thirty or forty years experience, and could not be mistaken as to the age of the cattle found in the lane. At least five of them were year olds. While driving the cattle down the lane, the defendant said that he and G. C. Barber were partners in the OLO brand, and that the cattle were partnership property. Witness was not certain, but thought that the 7 brand was on all of the cattle.

John Bishop testified, for the State, substantially as did the witnesses Campbell and Christie McCoy, and in addition that, several days after the last search of the pasture for the cattle found in the lane and left in the Houston pen, the witness, R. M. Glover, Ed. Bundick, Al and Leslie Beasley and Charley Ellis made a final search of the Murray and Houston pastures for the cattle, and found two of the animals dead in the Houston pasture. One of them was a speckled roan, and the other was a red. They lay on their right sides, about two hundred yards apart, one with a bullet hole behind the shoulder, and the other with a bullet hole through the neck. Each of those animals was two years old. Each was branded JOB—the old brand—and OLO, a recent brand. Witness recognized them at once as two of the same animals found in the lane by Campbell and his party, and

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left in defendant's pen a few days before. Witness did not see the 7 brand on those animals, but he did not turn the bodies over. The bodies lay in a hollow and witness observed that the ears exposed to view had been cut off. Some time subsequent to the discovery of the dead bodies of the animals in the pasture, the witness was in Nixon's store in Rancho, when he saw the defendant pass by with a small bunch of cattle. He rode up to the store and asked witness how long he would be in town. Witness replied that he would not be there long. Defendant then said that he wanted to have a talk with witness, and asked him to wait until he had disposed of his cattle. He came back presently and asked witness to go to the back of Nixon's store with him. Witness did so. He then remarked that there had been a great deal of talk about this transaction floating around, and that witness and Dick Glover were the only parties connected with it who had given him a fair deal; that he wanted witness to understand that he had no ill feeling against witness, but was his friend. He then said: "I acknowledge to running the cattle out of the pasture because I did not want Captain Jones to get them." He then asked: "John, don't you think you can be mistaken about the cattle you found dead in the pasture being two of the cattle you found in the lane?" Witness replied: "No; they were two of the same cattle." Defendant replied: "I will not dispute your word, but I will show up the cattle." In the same connection he said that the OLO brand was his, and that he and Barber were partners. Witness did not hear defendant tell Campbell, when the cattle found in the lane were left at the pen, that he would furnish grass, grub and water for them. Defendant did not tell witness that he bought the cattle from Barber, nor did he say how he got them.

Ed. Bundick testified, for the State, that about May 1, 1887, he was called upon by Deputy Sheriff R. M. Glover to assist in searching a pasture for JOB cattle. Witness, Al and Leslie Beasley, Charley Ellis, John Bishop, R. M. Glover and Jap Glover went into the Houston pasture and searched it. They found the dead bodies of two two year old steers, one a speckled roan in color, and the other a red. They were branded JOB on the left hip, and OLO on the side, and their ears had been cut off. Each of these animals had been shot from a forty-five calibre pistol. Witness did not see the 7 brand on either of them. Al Beasley and Charley Ellis testified, for the State, substantially as did the witness Bundick.

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Sol Brown testified, for the State, that he was a resident of Karnes county, and was brought to this court under attachment as a witness for the defense. Late in April or early in May, 1887, the witness and M. C. Patton went from witness's place in Karnes county to the M. G. Knowles pasture, in Wilson county. They traveled through the lane mentioned in the testimony of the previous witness. At a point in that lane, on the day that Campbell and his party were said to have found some cattle, the witness and his party passed seven head of cattle, standing in a shade. Five of the animals were two year old steers, branded JOB on the left hip and OLO on the side. The latter brand appeared to be several weeks old. Two of the two year old steers were speckled roan in color, two were red, one was spotted, one was a four year old red steer, and the remaining one was a three year old brown steer. About the same time witness saw Campbell and his party at a well in the lane.

It was next proved, by the State, that the recorded brand of G. C. Barber was the figure 7, and the OLO brand was not of record in Gonzales county. It was also proved that JOB on left hip was the recorded brand of John Jobe, and that Jobe's mark was a crop off the right ear.

The State rested.

John Blain, the defendant's brother, testified, in his behalf, that in March, 1887, he sold the defendant twenty-seven head of mixed cattle, and on the nineteenth day of March the witness started those cattle from his place, on the east side of the Guadalupe river, to the defendant's pasture near Rancho, about thirty miles from Gonzales. Witness drove the cattle on the first day to G. C. Barber's pasture, where Barber put about the same number of cattle with the bunch which witness was driving. Among the cattle put into the herd by Barber were six three year old cattle branded JOB. Milton Fly, George Nelley and Hiram Stevenson were present at the time. The parties named then drove the cattle to Tom Stevenson's pasture, where they were kept over night. On the next morning, March 20, 1887, the cattle were driven to defendant's pasture, put in the pen, and all save a few very poor ones were sold by witness to defendant, and turned into the pasture. When Barber put the cattle he had with those witness had, he said that he had sold them to defendant. Of the JOB steers put into the herd by Barber, two of them were speckled roan in color and several were red. The witness was digging a tank in the Murray pasture when Sheriff Jones

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and his men came and searched that pasture. On that same evening the witness saw some cattle in defendant's pen which were branded JOB and OLO. They were some of the cattle driven by witness, Barber and Nelley to that pasture in March. Defendant was not present when the cattle were started from Barber's to his pasture, but was then at home in Wilson county. The witness was not now living on the defendant's place. He went there with cattle on March 20, 1887, and remained there until about the middle of April, when he left with cattle which he delivered to Mabry, and has since lived at his own home. He had not visited defendant's pasture but two or three times since the middle of April, 1887. The cattle sold to Mabry were delivered to him just across the river from Gonzales a few days before the sheriff and his posse searched the Murray pasture. Since then, the witness had branded calves in the Houston pasture, of which defendant had charge. The JOB cattle driven by witness, Barber and Nelley to defendant's pasture were all three year old steers. Witness did not, during the search of the Murray pasture, tell John Bishop that the pasture contained but one JOB animal, and that it was a four year old steer. Witness did not see Campbell and his posse put the cattle in defendant's pen, but saw some JOB cattle in that pen that night. Witness did not know what had become of the six JOB steers he took to defendant's place.

George Nelley testified, for the defense, that he lived near Stockdale, in Wilson county, but had been working in the J. D. Houston pasture, of which the defendant had charge. In March, 1887, the witness went from defendant's place to John Blain's, and helped John drive some cattle to the defendant's pasture. They took the cattle the first day to Barber's pasture, where Barber put into the herd about twenty-five head more, six three year old JOB steers being among the number; all of which Barber said he had sold to the defendant. Of the six JOB steers two were speckled roan and several were red in color. Those cattle were penned the first night at Tom Stevenson's pasture. They were driven to defendant's pens on the next morning, branded OLO and turned into the pasture. Witness was at the tank in Murray's pasture when Jones and his posse came there to search it, which was on Saturday. From the tank witness went to defendant's house, and thence rode with defendant to the pasture gate, where he was arrested for carrying a pistol, and was taken to Gonzales and placed in jail. Witness did not

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see the cattle that were put in the pen by Campbell and McCoy on that night, as he was taken to town in arrest by Jones. Since his release the witness has been working for the defendant, gathering cattle in the Houston pasture and putting them in the Murray pasture. He had never seen but threes of the six JOB cattle since the pasture was searched. Those three he put into the Murray pasture. He did not know where the other three were, and had never seen any of them dead.

James King testified, for the defense, that he was at the defendant's house sick when John Blain, Nelley and Barber brought a bunch of cattle to that place. That was in March, 1887. He took some water to the pen for the men while they were there, and saw the cattle. Six of those cattle were three year old steers, branded JOB. Those cattle were placed in the OLO brand. There were two pastures known as the Houston pastures. One of them contained about twenty thousand acres, and the other about three thousand. The large pasture was heavily overgrown with brush, and a hundred men, hunting a week, could not find and gather all the cattle in it. Witness had worked for the defendant about three years, and had always been paid by the defendant in person. Witness's principal business was to look after defendant's stock, but he helped with the Houston stock. He was with defendant when defendant, on the day of the search, went down the lane and overtook Mr. Campbell, McCoy, and others, with the cattle they penned that night at defendant's place. Witness did not know how those cattle came to be in the lane. Witness had been gathering cattle in the Houston pasture and putting them into the Murray pasture, which the defendant and Barber told witness they had bought from Murray. Witness put four of the six JOB steers into the Murray pasture. Defendant and Barber told witness that they were partners in the OLO brand. Witness did not know how many cattle there were in the OLO brand, but there were more than a hundred. Witness did not know that the JOB cattle found by Campbell and McCoy in the lane were the same animals which Barber sold to defendant, because he was not present when Barber's delivery to defendant was made, but they were the same animals witness saw in defendant's pen when he took the water to John Blain, Nelley and Barber when they arrived. Witness knew nothing about two dead steers being found in the pasture.

Milton Fly testified, for the defense, that he was a butcher

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and lived in Gonzales. One Sunday evening, late in March, 1887, he went to Barber's pasture to get some beeves. While there John Blain and Nelley arrived with a bunch of cattle, to which Barber added others, including five or six three year old steers, branded JOB. Barber said that he had sold the animals to defendant. Two or three of the JOB animals were fat, and witness proposed to buy them for beef. Barber refused to sell them unless witness would take all in the JOB brand, which witness declined to do. All the cattle were put into Stevenson's pasture for the night, and John Blain, Nelley and Barber went with witness and his cattle to Gonzales, and were in that town after supper on that night.

Hiram Stevenson testified, for the defense, that he was present in March when John Blain, Nelley and Barber gathered some cattle in Barber's pasture, and put them in a bunch brought to Barber's place by Nelley and John Blain. The bunch gathered in Barber's pasture included six three year old steers, branded JOB. Those animals were also branded 7 on the point of the shoulder. Three of them were speckled roan in color, and three were red. Those cattle were penned at witness's father's place that night, and taken off next morning. They were started to defendant's ranch about twenty-five miles distant. Witness helped drive those cattle about thirteen miles of the distance.

Milton West testified, for the defense, that he knew when Campbell, McCoy and others went out to search the defendant's pasture. After the party left Rancho, witness went to the Houston pasture. He saw John Blain at that time working on a tank in the Murray pasture, and saw the cattle in a pen about two hundred yards distant. The defendant and others who worked in the Houston pasture wore arms and had worn them ever since the fence cutting epidemic, although there had been no fence cutting since the spring of 1885. The defense closed.

John Bishop, recalled by the State, testified, in rebuttal, that on the day the Murray pasture was searched, he heard John Blain, then at work on a tank, say that there was but one JOB animal in that pasture, and that it was the four year old red steer.

The proposed testimony referred to in the first head note of this report was that offered to be made by the witnesses Jones, Killough and Hawkins, to the effect that, at the time set for the preliminary examination of this defendant, one G. C. Barber,

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now indicted with defendant, but not then in arrest, came forward, and said that he sold the JOB cattle to defendant.

The charge of the court referred to in the second head note reads as follows: "All persons are principals who are guilty of acting together in the commission of an offense, when an offense has been committed by one or more persons. The true criterion for determining who are principals is, did the parties act together in the commission of the offense? Was the act done in pursuance of a common intent, and in pursuance of a previously formed design in which the minds of all united and concurred? If so, then the law is that all are alike guilty, provided the offense was actually committed during the existence and in the execution of the common design and intent of all, whether in point of fact all were actually bodily present on the ground when the offense actually took place, or not."

Ponton & Fly, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. I. It was not error to reject the declarations of Barber with regard to the cattle. Such declarations were hearsay, and, besides, were the declarations of a co-defendant. "Persons charged as principals, accomplices or accessaries, whether in the same indictment or in different indictments, can not be introduced as witnesses for each other." (Code Crim. Proc., art. 731; Penal Code, art. 91; *Helm v. The State*, 20 Texas Ct. App., 41; *Booth v. The State*, 4 Texas Ct. App., 202; *Rutter v. The State*, Id., 57.) The same rule of exclusion would, of course, for an additional reason, apply to the declarations of such principal, accomplice, or accessory, unless the same constitute a part of the *res gestæ*.

II. We find no error in the charge of the court. Upon the subject of principals, it is in harmony with the settled doctrine established by repeated decisions of this court, and is applicable to the facts in proof. (*Cook v. The State*, 14 Texas Ct. App., 96; *O'Neal v. The State*, Id., 582; *Bean v. The State*, 17 Texas Ct. App., 60; *Smith v. The State*, 21 Texas Ct. App., 107; *Watson v. The State*, Id., 598, and several other decisions.)

III. In our opinion the evidence supports the conviction. Defendant's explanation of his possession of the cattle was shown to be untrue. Said explanation related to another bunch of cat-

Syllabus.

tle which he purchased from Barber about one year prior to the theft of the cattle involved in this prosecution.

Finding no error in the conviction, the judgment is affirmed.

Affirmed.

[This opinion was delivered at Tyler, October 26, 1887. A motion for rehearing being filed, it was taken to Galveston under advisement, where, in an oral opinion, the motion was overruled on January 25, 1888.]

No. 2398.

LOUIS WILLIAMS v. THE STATE.

1. **PRACTICE—EVIDENCE—IMPEACHMENT OF A WITNESS.**—Under our practice, a witness called by the opposing party may be discredited by proving that on a former occasion he made a statement inconsistent with his testimony on the trial, provided such statement be material to the issue. The witness may also be discredited by proof that, on a former trial, he omitted to state facts stated by him on the pending trial. And generally, whenever, on a former occasion, it was the duty of the witness to state the whole truth, it is admissible to show that in his statement he omitted facts sworn to by him at the trial. But it is only upon a denial, direct or qualified, by the witness, that such statements were made, that proof of them can be made. The impugned witness in this case not only did not deny the inconsistent statements imputed to her, but admitted that she made them. *Held*, that under the rule announced, the impeaching testimony was erroneously admitted.
2. **SAME.**—It is now a well settled rule of practice in this State that an impeached witness may be corroborated by proof that he had at other times made the same statements as those testified to by him on the trial, and about which he was impeached. Under this rule, it is *held* that the trial court erred in refusing to permit the defendant to introduce proof to support his impeached witness by showing that, prior to the trial, she made statements substantially the same as those she made on the trial and about which she was impeached.
3. **MURDER—MANSLAUGHTER—CHARGE OF THE COURT—WHEN THE ADEQUATE CAUSE** relied upon to reduce murder to manslaughter is insulting language by the person slain towards the female relative of the slayer, it is error for the trial court to give in charge to the jury the provisions of article 594 of the Penal Code, to the effect that the provocation must arise at the time of the killing, and that the passion must not be the

24	637
28	910
28	221
24	637
30	564
31	404
32	508
24	637
35	184
35	295
35	489
38	363

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result of a previous provocation. On the contrary, the jury in such cases should be instructed that the time intervening between the slayer's appraisal of the insult and his first meeting with deceased is not a material consideration, provided the adequate cause be shown, and the state of the slayer's mind, predicated thereon, did actually exist at the time of the killing.

4. **SAME—VERDICT.**—It is not essential, though proper, that the charge of the court should instruct the jury in the forms of verdicts which may be rendered by them; but, when such an instruction is given, it should embrace every verdict which might be rendered in the case.

APPEAL from the District Court of Bexar. Tried below before the Hon. G. H. Noonan.

The conviction in this case was in the second degree for the murder of James Brown, in Bexar county, on the seventh day of May, 1886. The penalty assessed against the appellant was a term of seven years in the penitentiary.

David Coulson was the first witness for the State. He testified that he lived within the city limits of San Antonio, about two and a half miles west from the court house. He knew the defendant, and was acquainted with Brown at the time of his death. Brown was then in the employ of the witness, and had been for about three months. The witness had a dairy on his place, which he had leased to a Mr. Hand. Prior to the leasing of the dairy to Mr. Hand, the defendant had been in the witness's employ. Subsequent to that time, and at the time of the homicide, defendant was in Hand's employ, driving the dairy wagon. He and his wife occupied a house on the witness's place, about one hundred and forty yards from witness's residence. The deceased lodged at the witness's house, but boarded at defendant's house.

In connection with his dairy business, Mr. Hand ran a creamery, which was situated in a building on Houston street, in San Antonio, about two and three-quarter miles distant from the dairy. The witness went to Hand's creamery a little after four o'clock on the evening of May 7, 1886. He either found the defendant at the creamery, or the defendant came there soon after witness's arrival. He was in a towering rage, no one but defendant and witness being then in the creamery room, though several parties were in the building. No third party that witness could recollect took part in the conversation which ensued between witness and defendant. Speaking to witness about the deceased,

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and cursing violently, the defendant told witness that he would be "God d—d if he didn't kill Jimmy," the deceased. Witness, in reply to this declaration, remonstrated with defendant, and attempted to dissuade him from his declared purpose, but defendant persisted in declaring that he would kill the deceased. In connection with each of the threats so made, the defendant said that deceased had cursed his wife, and that he would not submit to that from any man. He assigned no other reason for his deadly purpose than that deceased had cursed his wife. Witness presently left the creamery. Defendant remained, and the last words witness heard him utter were repetitions of his threat to kill the deceased. He was exceedingly angry. Witness got home about dusk, when the deceased met him and took his horse. Witness did not then see the defendant, who rarely got back to the dairy until nearly nine o'clock at night. Witness did not see the deceased again until between ten and fifteen minutes before eight o'clock. He had then been shot. When deceased took witness's horse, witness went into his house, threw off his coat, took off his shoes, and got some paper on which to write a pay check for the deceased. Some time later and about eight o'clock, witness heard a shot. He knew at once from the sound that the shot was fired at or about the defendant's house, and at once put on his shoes to go there. About the time he got his shoes on, a second shot was fired, and almost immediately a man came to his house to notify him of trouble at defendant's house. Witness went at once to defendant's place, and at the barn met the defendant, with a pistol in his hand, hunting for deceased, and Mrs. Williams following behind him, begging him to stop. When witness met defendant, he said to witness: "I shot at him, d—n him, and I think I hit him; if I didn't I will kill him before day." At this time Mrs. Williams was begging defendant to desist and give up his pistol. She also asked witness to take the pistol. Mrs. Williams finally induced defendant to go into the house and sit down. After much persuasion and the assurance of the witness that Brown's pistol was still at witness's house, defendant gave his pistol to the witness. While protesting against returning to the house, and surrendering his pistol, the defendant declared that he did not want to give the deceased an advantage over him, and that if he went into the house the deceased would kill him.

In the same connection he declared that he had shot the deceased because he cursed his wife. He assigned no other cause

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for the shooting. He declared again, as he had previously declared to witness, that deceased cursed his wife that morning, but he did not say at what time in the morning. The witness made an examination of defendant's premises after the shooting. He found no blood in the house, but found the stain of burned powder on a towel which hung on the right hand facing of the door of the room which was used as a sitting and dining room. The shooting which, as stated, took place at about eight o'clock, occurred while the people in defendant's house were at supper. The table was still set when witness went in after the shooting. Several persons boarded with defendant, and were at the house when witness got there. Pretorius, Allen Sharpley and Jack Mitchell were there, and witness believed that H. P. Howell, William Swaggerty and Frank Nolen were there. J. T. Dyall was not then boarding with defendant, but with his brother-in-law, who lived in a house about thirty feet distant from defendant's house. Other men whose names were mentioned by counsel (not disclosed in the record) were there. Witness was of impression that Mr. Dyall, who was in the last stages of consumption, went back to his home in Alabama to die. Another man, known as Ed., went from San Antonio to Fort Worth. If he was now in San Antonio witness did not know it. He did not know what had become of Howell. One or two of the boys who were at defendant's house when the shooting occurred, according to witness's information, joined the army and afterwards deserted. Witness did not know what became of Allen Sharpley. He knew Swaggerty's whereabouts for a time, but did not know where he now lived. Another man referred to the witness knew only as the man he saw with Major Teel after either the preliminary trial of this defendant before the justice of the peace or his habeas corpus trial before Judge Noonan. That man went from the court house with Major Teel, but witness did not know, except from hearsay, where he went to. Witness did not know what had become of either Mitchell or Nolen. The several parties named were employes of Hand. They disappeared very soon after the homicide. Witness had great difficulty in getting any of them to stay on the place, even for a short time, after the shooting.

The witness did not know that defendant's shot had taken effect upon Brown's body when he got defendant's pistol. When he secured the pistol he took it to his own house and immediately returned to defendant's house. Meanwhile defendant dis-

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appeared. Witness was gone with the pistol but very few minutes. While disposing of defendant's pistol, at his house, witness made search for deceased's pistol, and found it among deceased's clothes in his room. It had not been discharged. The second shot fired by defendant was fired at a boy called "Skinhead." At least "Skinhead" said that the shot was fired at him, and defendant, who was present and heard what "Skinhead" said, remarked that he fired at him ("Skinhead") mistaking him for the deceased. When this second shot was fired, the defendant was standing south of his house, and between the house and the barn, and the boy called "Skinhead" who, witness thought, was Sharpley, was in the brush, jumping pretty high. Referring to this incident after the shooting, defendant said that he thought "Skinhead" was the deceased, and that he was going to witness's house to get his pistol. During this parley, which was immediately after the shooting, and before Mrs. Williams and witness got defendant into the house, defendant said that he knew deceased had gone to get his pistol, and refused to surrender his pistol. The interval between the two shots did not exceed a minute. Mrs. Williams, in the presence of defendant, said that defendant fired the first shot from the inside of his house. Other parties told witness the same thing, but witness could not say that defendant was then present. Defendant justified himself in shooting by saying to his wife, in witness's hearing: "I shot because he cursed you, Mamie." He assigned no other reason. Witness could not say that anybody, in defendant's presence, said what deceased was doing at the time of or immediately before the shooting, but defendant told witness, in substance, that when he fired the first shot the deceased was "getting out of the way in the door." He did not say what the deceased was doing when he, defendant, reached home. Defendant did not tell witness where he stood when he fired the first shot.

After he put defendant's pistol away, and searched for and found that of the deceased, the witness instituted a search for Brown, and found him in the mesquite brush, about one hundred and eighty yards due west of his (witness's) house. He was suffering grievously from a pistol wound. The ball entered the right side just above the collar bone, but witness could not say how it ranged. Deceased said nothing about his condition, nor was his condition discussed by any one in witness's presence. Brown was found about twenty minutes after the shooting. He

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was taken to a house on a litter, and died there about an hour and a half later. If the defendant came back to the dairy, or was on witness's place after witness left him to go to his own home, with his pistol, witness did not know it. He did not see defendant again until he was brought back by the officers. The witness could not remember that anything of a particular nature was said by defendant, after the shooting, as to whether he was going to remain on witness's place over night, or whether he was going to town to surrender. Witness understood him, however, to promise to spend the remainder of the night up stairs in witness's house, and did not expect him to leave when he, witness, went to the house with the pistol. It was not then known that Brown had been hit. The pistol used by defendant was a revolver, and witness believed it to be the one now exhibited to him by counsel. It was now in the condition that witness received it from the hands of defendant. Four barrels were loaded and two empty. The empty barrels did not join. Witness did not remember that he ever heard defendant say who owned the pistol, but he did hear Ed Lewis say who owned it. Witness did not know the present whereabouts of Lewis. The last he ever heard of Lewis was through a letter written by him from Fort Worth to witness's wife. Lewis, at the time of the homicide, was in the employ of Mr. Hand, and had charge of the creamery engine. He remained on the place but a short time after the homicide.

When defendant gave his pistol to witness, he did not tell witness who to give it to. Several parties on that night told witness where defendant got the pistol, but witness could not remember that defendant was present. He did not think defendant kept a pistol on his place: at all events, witness had never heard of his doing so during the year he had him in his employ. Witness did not think that defendant, at the time he left, knew positively that he had shot the deceased. He told witness that he thought he had hit deceased, but did not claim to be certain that he had. Deceased at that time had not been found. The defendant was brought back to San Antonio by Deputy Sheriff Alexander and somebody else, two or three days after the shooting. A gentleman and lady brought a message to witness's house on the night of, but after, the shooting. Witness knew Puckeridge and his wife. They were at witness's house about three-quarters of an hour before the death of deceased, but witness was now unable to say whether or not they, or either of

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them, delivered a message to the deceased. Puckeridge lived about half a mile northeast of witness, but not in the direction of town. There was no road from witness's house to that of Puckeridge.

On his cross examination, the witness stated that, at the time of the homicide, the defendant was in the employ of Mr. Hand, and not of him, witness. Hand had leased witness's dairy, bought milk of witness, and was running the business, but witness did not consider himself and Hand to be in partnership. Hand carried on the creamery on Houston street, and for milk paid witness a certain amount. Witness's business at the creamery on the day of the homicide, where, as stated, he met the defendant, was to get the money then due him from Mr. Hand. Witness owned the engine and other articles used in the creamery. He had an interest in the creamery, but not as partner. It was about four o'clock on the evening of the fatal day that witness saw defendant at the creamery. He did not know where, if anywhere, he saw defendant in the morning of that day. Defendant's usual hour of starting from the dairy to town in the morning was at four or a little past four o'clock. Witness may have seen defendant on the morning of the fatal day, but did not recollect doing so.

Question. "You say about four o'clock in the evening was the first time you saw him on the seventh?"

Answer. "I didn't say that exactly. It was the first time I remember to have seen him. He was then mad, and cursing bitterly."

Q. "He told you that Brown had cursed his wife?"

A. "No, he didn't; he said 'Jimmy,' Jimmy is Brown, and he used the term 'Jimmy.' He was a favorite among us all, and his name was 'Jimmy.' I called all my hands by their first names. I had employed Mr. Williams when in Ohio, and he came on here and we had lived in perfect friendship. Before he cursed so in my presence, my feelings were entirely friendly. His swearing in my presence did not command my approval at all. I was not pleased with his manner; I thought it was insulting, he knowing my position. I have not employed nor given my support to any one to prosecute this defendant. I have not paid a nickel to do so, nor promised to pay any, that I know of. I don't recollect anything of that sort."

Q. "Have you not talked to a very great many people in relation to this matter?"

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A. "Yes [and you would have talked too] if you had been placed in my position, and been published in the papers by reporters as a party to the thing. I published a card in the Express newspaper."

Q. "Did you state in it that that conversation took place at four o'clock in the morning?"

A. "The Express, as it frequently does, made a terrible blunder."

Q. "You wrote a communication to the Express over your own signature?"

A. "I did not write a communication to the Express; another gentleman, Judge Price, wrote that document."

Q. "Did you ever, at any time, correct that matter about four o'clock in the morning?"

A. "I don't recollect. Of course, if I saw it, I applied for a correction of it."

Q. "Didn't Mr. Price read you that communication before you signed it for publication?"

A. "Not as at four o'clock in the morning. Of course it was written in my presence. My recollection is that I signed the document myself, but I can't say so positively. I spoke of it frequently. I have been asked five hundred times: 'Where is the man who killed the man at your place?'"

Q. "Have you not stated that he ought to be hung, and that his neck ought to be broken?"

A. "I am glad you asked that question, and I will answer it. I said that it was a cowardly act. I have said that of him (defendant) as of any other man under similar circumstances. I believe in the enforcement of the law for crime. I don't know that I am antagonistic to this defendant outside of this one offense. This offense is the one I am soured about. The newspapers put it on my place anyhow, and I did not, as I could not, deny that it was on my place."

Q. "Did you not state that you had leased your cows to Mr. Hand?"

A. "I changed relations that day. I suppose Mr. Williams knew it. I don't remember seeing him (defendant) on the seventh, until four o'clock in the evening, when I had a conversation with him at the creamery. I don't know that I then told him of the change in my relations with Mr. Hand. Jimmy was in my employ. The cows and the interest in the pasture were

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mine, and I took charge next morning, as per agreement. None of my cows were shot."

Q. "Were none of them hurt in any way?"

A. "I think not, sir, by that shooting. From the time I heard the first shot and went out and met Mr. Williams, I had time to put on my shoes and walk about one hundred yards. It was only a minute or two. I went out in a hurry and met Mr. Williams."

Continuing in reply to questions, the witness said that, upon going from his house after hearing the shots, he met the defendant at a point about twenty feet distant from his west gate. He could not say exactly how long he stood there with defendant and his wife before defendant was prevailed upon by the pleadings of his wife to go back to his house. Some time elapsed after reaching the house before the defendant could be induced to surrender his pistol to the witness. Not instantly, but soon after witness got the pistol, he went direct to his own house to put it away. He returned to defendant's house almost immediately, and found Mrs. Williams, her children and the men, except defendant, "scattered about." The "boys" (meaning the hands) were about the place when witness and Mrs. Williams were trying to get defendant to return to his house from the point near witness's west gate, but none of them came to where witness, Mrs. Williams and defendant then were. They were "scattered about" with lanterns, talking and laughing about "Skinhead." Witness did not know that a single person of those scattered about came back to the house until he, having taken defendant's pistol to his own house, returned to defendant's house. Witness's card in the Express of May 12, 1886, did not purport to be a circumstantial narration of what occurred at the time of the homicide, but was an answer to misrepresentations about himself, made by the reporter of that paper, who, in the previous notice of the tragedy, actually charged witness with complicity in the murder; at least, the witness so construed the language of the article, and knew that he was blamed by the officers, Captain Shardein, particularly, for not giving information on that night of what had occurred. As a matter of fact, the witness was on the eve of starting to town to lodge information when one of the other men, much younger than witness, proposed to go, and witness directed him to go at once, and to report the matter at police headquarters, after summoning a doctor. Witness had been told that that man did not appear at

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headquarters. Witness did not arrest defendant when told that he had shot a man, nor did he attempt to do so. He had never arrested a man in his life, and never expected nor intended to arrest one in the future. He did not call upon Hand's employes to arrest defendant, because defendant promised, and he expected him, to stay locked up, up stairs in his house until morning.

Q. "How long a time elapsed from the time you started to hunt for Brown until you found him."

A. "I don't know, nor can I approximate the time, but it was not long. I went into the house to see if any one had been shot, and could find no hole. I then said: 'He is hit, and now, boys, we must find him.' Williams was gone, and it was not a long time until Brown was found. I don't recollect who was first to find him, but we were all there pretty soon. I did not look for a track of blood. The jury of inquest were there, and I left it to them. I came in before day to see what was to be done. I went to the house of the justice of the peace on Commerce street and woke him up. This was early—before daylight. I went to police headquarters first, and was there instructed to go first to the justice of the peace, who would be in his office at seven o'clock. I went then to the residence of Justice Crawford and woke him up. I went into his bed room. Crawford was sick, and told me that Justice Adam would be at his office at seven o'clock. I was at Adam's office at seven o'clock, but did not find him. I was in there at intervals until he came. Brown was badly wounded when we found him. He was talking some. We carried him to Houston's house, about two hundred yards from where we found him. He lived about three-quarters of an hour after reaching the house. Brown had been working for me up to that time, but then had his notice. I was not present a great deal at Houston's before his death, but hurried off to get a doctor. I sent a man for the doctor as soon as I could get a horse from the pasture. Brown made no statement about the shooting, so far as I know. He (Brown) was a quiet, inoffensive man; a man who had never, so far as witness knew, wronged any one. His superior had never been in witness's employ. Defendant, when not in liquor, was a quiet man. He did not drink much. I don't know that he ever had trouble with the people on my place. I know of no other serious difficulty he ever had. He had had trouble with one Mott, but I don't know what about. That falling out lasted for a few days. I have disagreed with men who worked for me.

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The defendant worked for me a good while, but possibly not so long as three or four years. I found a pistol among Brown's effects. I heard it said that he had a pistol, and as I found one among his effects I inferred that it belonged to him. I don't recollect whether it was loaded or unloaded, but my impression is that it was loaded. I did not see Brown have a pistol that day. I never saw a man have a pistol on my place until I saw the pistol in the hands of Williams. I did not permit the bringing of pistols on my place, as I was afraid of them. I had heard Williams and others say that he had a pistol, but Williams was not in my employ. I knew that the officers brought Williams back, because they told me so. Mr. Swaggerty was at that time on the place. He was one of the boys, and occupied the room occupied by the other of Hand's employes. Defendant was not there when I got back after taking his pistol to my house. They told me he had gone, and, as we could not find him, I supposed that he had gone. I have no mark on the pistol you show me by which to know that it is the pistol I got from defendant. It looks like the same pistol, and I think it is the same. The chambers are in the same condition as when I delivered it to 'Squire Adams—an empty chamber, then a loaded, and then an empty one. I am satisfied the pistol is the same."

Q. "You say a man named Ed told you it belonged to him? Was that man present when he said it belonged to you?"

A. "I don't remember what he did say. He told me so. I don't think the defendant was present. I don't know of my own knowledge who is the owner of the pistol. I did not sell it."

Q. "You say that he said to his wife, in your presence: 'I shot him because he cursed you, Mamie?' Now, what was the statement made in regard to the shooting when he talked to his wife and called her by name?"

A. "I think he said: 'I would kill any man who would curse you.'"

Q. "You don't know exactly what it was?"

A. "I exactly know that he said he would kill any man for cursing her; that that was the reason he did it. He said before that he was going to kill deceased for that reason—for cursing his wife."

Q. "Do you know John Tom McGee, and have you ever had a conversation with him about this matter?"

A. "I know John Tom McGee, and have known him a long

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while, and I suppose that I have had a conversation with him about this matter. He has been at my house frequently."

Q. "Did you not, at your place, a few days after the homicide, tell John Tom McGee that defendant told you that, if you would discharge Brown it would end the difficulty?"

A. "I did not, sir."

Q. "Did you not, in the same connection, say to him that the Virgin Mary had been insulted, and that the defendant's wife was no better?"

A. "I did not. I did not tell him that the Virgin Mary had ever been insulted. I told him that Queen Victoria, a very different person than the Virgin Mary, had been insulted a thousand times, and is a noble old matron yet."

Q. "A short time after Brown took your horse, did you not ask some of the boys for Brown? Did they not tell you that he had gone to defendant's house, and did you not exclaim: 'What! That fellow go over there after insulting that man's wife?'"

A. "I did not. I will tell you what I said. I told Mr. Williams that I would discharge Brown, and had deposited the money to pay him off. When he took my horse I went into the house, laid off my clothes, and came out about the time that Brown should have put the horse up. I called twice for Brown, when somebody said that he had gone to defendant's to get supper, and I said: 'What! Is it possible he has gone to that man's house after cursing his wife?' I turned over to the undertaker Brown's effects, including his pistol and the money I was due him, to pay for Brown's burial. I said that I supposed Dyll was dead. He left here for Alabama in the last stages of consumption, and I have never heard from him since. He was here at the defendant's examining trial. I do not know the present whereabouts of Herman, Fuch, Shapley, Lewis, Swaggerty, Mitchell nor Nolan."

Re-examined, the witness said: "I told the defendant I was going to discharge Brown. I told him I had the money all ready. I told him, when he was cursing, that it was not necessary to curse, as I would discharge Brown and he would not see him again. That was about four o'clock. I don't know of my own knowledge that Brown cursed Mrs. Williams. I got that information only from Williams, and told him that I would not tolerate on my place a man who would curse a woman, and that I would discharge Brown as soon as I got home. I had not been home exceeding thirty or forty minutes when Williams got back

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from town. He did not, on his return, call upon me to know if I had, or intended to, carry out my avowed purpose to discharge Brown. I don't know how long Williams had been home before he shot Brown, but the shooting occurred a half or three-quarters of an hour earlier than his usual time of getting home. I did not bring the defendant here from Ohio. I hired him there and he came here. He proved a first rate hand. I have no personal feeling against him, outside of this murder. After I took the pistol in the house and came back and found Williams gone, I called the boys together and made them show how the thing was. They showed me a powder burn on a barrel by the door facing, which showed the direction of the shot. I said: 'If he is shot there will be no bullet found.' Finding none, I said: 'There is no bullet hole to be found, boys. He is shot. Now, let's find him.' Williams did not know whether he had hit him or not. He told me he thought he hit him. As soon as we found him I ordered a litter, and a horse was given a man to go to town. I was going at first, but this man said he was younger and could go better. I told him to go to police headquarters, and from there telephone for a doctor. It was no fault of mine that the man did not go to police headquarters. He returned after Brown's death. No doctor came back with him, he said, because he had not taken a horse for him. If I am a judge, I would say that defendant was drinking heavily at the time of the homicide. He did not repeat to me the words Brown used to his wife. He merely said that Brown cursed her. I never had a conversation with John Tom McGee in which I said anything about the Virgin Mary. If I said anything to him at all, I may have said what I said to Williams, that Queen Victoria had been cursed a thousand times, and would be cursed as long as there was a man on the Emerald Isle, but she was a noble old lady still. I told Williams that I had been cursed, and it might be some man had cursed my wife, but I had not killed that man. I said to him: 'The day you do it your wife and children will be orphans, and you will be spending your days in the penitentiary. Don't kick at trifles any more; I will discharge him and you will not see any more of him; he is a poor, ignorant creature anyway.' I told John Tom McGee this whole conversation. I also told Williams that it was folly and madness to think about killing Brown, and that I would discharge Brown as soon as I got home, as I would not have a man on my place who would curse a woman. I would probably have discharged Brown very soon any way,

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as I had no further use for him. I never knew anything about a cow of mine being hurt. A man had better strike me than one of my cows."

Mrs. Annie Puckeridge was the next witness for the State. She testified that she lived with her husband, P. M. Puckeridge, on the second Alazan creek, about a mile and a half distant from Coulson's place, and not quite so far from the business center of San Antonio. Witness had seen defendant previous to the night of May 7, 1886, but had no particular acquaintance with him. The defendant came to witness's house between eight and nine o'clock on the night of May 7, 1886, just as witness and her husband were preparing to go to bed. He stopped at the fence and called for witness's husband. Upon the invitation of Mr. Puckeridge, the defendant came into the house. As soon as he got in, the defendant said: "I fired at a man, and I am afraid I shot my wife." Witness then said that she had better go and see, and asked her husband to go with her. Within a few minutes witness and her husband started, the witness taking a note written by defendant, which she gave Mrs. Williams when she arrived at the dairy. She did not read the note, and did not know its contents. Defendant remained at witness's house, as did her little girl, who was in bed. Witness and her husband remained at the dairy about half an hour. When they returned home witness gave defendant some money which Mrs. Williams sent by her. Witness did not know how much money Mrs. Williams sent defendant by her. It was in small gold pieces, and one fifty cent silver piece. Mrs. Williams went to Coulson before she gave the witness the money, and Coulson told her to send word to her husband to fly. At least Mrs. Williams brought that message from Coulson to witness, to be delivered to the defendant. Mrs. Williams said to witness, when she gave her the money: "Mr. Coulson says tell Louis to fly." Witness did not see Coulson give Mrs. Williams the money, but she knew that Mrs. Williams had no money when she reached her, and that she went at once to Mr. Coulson. She was at Coulson's house about ten minutes before she got back with the money. When witness got back she found defendant lying down on a small feather bed. She gave him the money, told him the man was shot, and that he had better leave, but she did not tell him that Coulson advised him to fly. Defendant then told witness that he fired his first shot because he thought Brown had a revolver. Witness knew that Brown was dead, but did not tell defendant so. When wit-

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ness told defendant that the man was shot, he simply exclaimed: "My God!" and, advised by witness and her husband, he left immediately, and witness saw no more of him. He did not say why he shot the man, or, if he did, witness did not hear him. It was after ten o'clock when defendant left witness's house. Witness did not take a note from Mrs. Williams to defendant.

James Van Riper testified, for the State, that he was a deputy sheriff of Bexar county. He and Deputy Sheriff Bob Alexander left San Antonio on the evening of May 9, 1886, to arrest the defendant for the murder of Brown. Witness could not now remember whether or not he had papers for the arrest of defendant. They found defendant in the hills of Blanco county, about twelve miles from Blanco city, about midday on May 10, and arrested him. He was alone and on foot. Witness did not ascertain whether or not defendant went into the city of San Antonio after shooting Brown.

The State rested.

Mrs. Mary A. Williams, the wife of the defendant, was his first witness. She testified that, for eighteen months which had elapsed since the killing of Brown by the defendant, she had earned for herself and three small children a precarious support by plain sewing. The events of the day preceding and the night of the shooting were indelibly stamped upon her memory. She had been up all the night of May 6, with her sick child, and was sitting with it in her lap at half past three o'clock on the next morning, when the deceased came to the house. She was still in her wraps. Deceased stepped into the room, and said to witness: "You are up mighty early." Witness replied: "It may be early for you, but I begin to feel that it is quite late." She then looked at defendant, and discovered an expression on his face such as she had never seen on a man's face before. Deceased then said: "Well, I begin to feel very sleepy too. You come to bed with me for a little while and we will both feel better." Witness said to him: "How dare you talk so to me. You leave this house this instant!" After a moment's hesitation the deceased turned and left the room, and witness thought he had gone. A few minutes later deceased returned to the house, stopped at the room occupied by the boys, and commenced cursing and swearing so violently that he aroused the children in witness's room. Witness called to him not to stop at that room swearing, but to go to the south room where the other men were sleeping. Deceased, in reply, said to witness: "By G-d you don't like it!"

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Witness replied: "No, Jimmy, I don't like it. It is not right for you to come into my house and talk as you have in the absence of my husband." Deceased then said: "By G—d, if you don't like it you need not take it." He then went swearing and cursing to the men's room, said something about sleeping until ten o'clock, went noisily to bed, and said he would not get up for any d—d son of a bitch. Witness got up and had breakfast ready at about daylight. Two of the boarders came down and sat down to breakfast, when witness started to the well to get a bucket of water. As she stepped outside from the house, Brown confronted her and said: "You did not like what I said this morning? Well, if you don't like it you can tell Louis about it, and I will shoot him. You know I have got something to shoot with." Witness at first intended not to tell her husband anything about Brown's conduct, but, reflecting that he would hear of it through the other men, she changed her mind. She first told him about Brown swearing at her. She advised him to go to town and tell Mr. Coulson to send Brown away, as she did not want a man on the place who had insulted her. Defendant then asked: "Did he insult you, Mamie?" Witness replied: "Yes," and, placing her hand on her husband's shoulder, told him exactly what Brown said to her. She then asked her husband to say nothing about it, as she feared defendant would execute his threat to shoot him. Defendant put on his coat at once, jumped into his wagon and went to town.

Recurring to the action of the deceased at her house in the early morning, the witness stated that the deceased said nothing immediately after she refused to go to bed with him. but on his return a few moments later he uttered horrible oaths, and used language too foul for a woman to repeat. He said, among other things, that if any "d—d son of a bitch didn't like what he said they could just kiss his —." Witness understood him to apply that remark to her, as he was talking to her about what he had previously said to her. Witness told her husband of that conversation when he came home to dinner. The little room into which deceased went after insulting and cursing witness was occupied at that moment by a man named Pretorius and a man named John Fuchs. The boys, Sharpley, Swaggerty, Harmon and "Johnny," and the man Mitchell, were boarding at defendant's house at the time. Deceased took his meals there, but slept at Coulson's. Witness's husband had been gone to town about thirty minutes when deceased pushed open witness's room

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door and came in. It was then between three and four o'clock, and long before the usual breakfast hour, which was half-past seven o'clock. Witness did not know whether any of her boarders were up and out at the cow pens when deceased invaded her private room. Witness's house consisted of three rooms, one of them being a sort of kitchen. Witness's room opened into the kitchen. The boys slept in the room nearest the dairy. They habitually got up before defendant did, and milked the cows at the dairy, which was about two hundred yards distant from the house. Defendant got back home from his morning round about nine o'clock. He went to sleep at once, and when he got up to dinner at two or half-past two o'clock, the witness told him of the conduct of the deceased. Mr. Dyall, one of the boarders, went to town with the defendant when defendant went on his evening round. Defendant returned from his evening trip at about candle light, or about seven o'clock. He did not own any arms at that time, and if there were any pistols on the place before that night, witness did not know it. The men had just sat down at the supper table, and witness had just retired to her room to get her baby to bed, when the shooting occurred. Howell, Pretorius, Fuchs, Allen, Sharpley and Mitchell were then at the supper table. Neither Lewis nor Swaggerty were there, and witness did not think that Frank Nolan was. From the kitchen, where the witness was, she heard defendant slip into the door, and say: "Jimmy, is it true that you insulted my wife?" She as distinctly heard deceased reply: "Yes, it is." Defendant said something which witness did not hear. She got up at once to lay the baby down, when Brown sprang into the kitchen, at which instant the first shot was fired. Brown then ran out of the house. The men then ran out of the house, followed by defendant with his pistol in his hand. Defendant said, as he ran out of the house, that he did not think he had killed Brown. He met Mr. Coulson a short distance from the house and told him that he was after Brown, but did not think that he had shot him. Mr. Coulson asked defendant for his pistol. Defendant refused to surrender it because he said Brown was armed, and if he gave up his pistol he would have no means of defense. Witness and Coulson then induced defendant to return to the house. After some persuasion, defendant gave his pistol to Coulson. Coulson started home with the pistol, and defendant left to go to town. Witness advised him not to go to town. She reminded him that he was a poor man, without money, and

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that if he went to town he would be arrested, jailed and convicted summarily. He said that he thought it best to go to town. He then went on as far as Puckeridge's, and sent Mr. and Mrs. Puckeridge back to witness.

Mr. and Mrs. Puckeridge, one of them bearing a note to witness from defendant, reached witness's house about half past eight o'clock. That note was now lost or had been destroyed. Witness told Mr. Puckeridge that she wanted to send some money to her husband. Accordingly, she got together what money she had, and went to Mr. Coulson for more. Coulson at first said that he had no money, but, after hunting about, he gave witness sixty-five cents, and said: "Here, give this to Louis, and tell him to get out of the way. God knows if I had any more I would give it to him." Mr. Coulson's direction to witness was to tell Louis to fly the country. Witness gave that money to Mrs. Puckeridge, and told her to give it to defendant, and to tell defendant that Mr. Coulson said for him to fly the country. Witness told the defendant, just before he left home, that, as he was a poor man, it would not do for him to stay, and that he had better leave. Altogether, witness and her husband had lived on Coulson's ranch about three years. They lived there once as long as twelve consecutive months. Witness knew of a difficulty between defendant and Coulson which occurred a short time before the homicide. The difficulty arose over the striking of one of Coulson's cows by defendant. At first the witness told no one save her husband about the insult offered her by deceased. She was too much mortified to tell any one else until the next day, when Mr. Hand, in conversation with her, asked her about the affair, and she told him, or started to tell him.

Cross examined, the witness said that she forgot to state in her testimony in chief that defendant fired a second shot after he ran out of the house in pursuit of Brown. He followed Brown out of the same door, and at a point about fifty yards from the house, fired the second shot at a man whom he was pursuing, evidently under the impression that he was Brown. In fact, that man was a young fellow called "Skinhead." Brown was then running northwest from Coulson's house. Witness was with her husband, endeavoring to prevent him from shooting, when he fired the second shot. After he had fired that second shot, defendant remarked that he did not think he had hit Brown. Coulson then came up and tried to get defendant's pistol. If defendant then told Coulson that he thought he had hit Brown, and

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that if he had not, he intended to kill him before morning, witness did not hear it. Defendant said to Coulson, in explanation of the shooting: "He insulted my wife, and no man, not even my brother, can do that." The witness followed her husband out of the house because she did not want him to kill Brown. and wanted to prevent him from shooting. Witness did nothing while outside of the house. Coulson asked defendant for his pistol, which defendant refused to surrender because, he said, Brown was armed. Brown might have been armed. He was in his shirt sleeves at supper, but witness did not know that he was not armed. Witness then knew that Brown had been hit, because she heard him say so as he fled through the door after the first shot. He had not been found when witness and Coulson got defendant in the house. Witness and Coulson prevailed upon defendant to surrender his pistol to Coulson within five minutes after they got him into the house. Witness did not tell defendant that she knew Brown was hit. She was too intensely excited to think of doing so. Defendant fired his first shot from the kitchen door, at a distance of about ten feet from Brown, who was then in the kitchen. Brown was sitting at the supper table when defendant came in. Brown did not speak loud when, as he went out of the door, he threw his hand to his shoulder and said: "I am shot." Witness was standing near the door, and heard him distinctly, but could not say that defendant heard him. Brown was standing in witness's room when the first shot was fired. He went out of the house through the front door, and went west around the house. Witness and her husband went out at the same door, but around the house in the opposite direction. Witness went out with her husband, and, as she did not know which direction Brown took on getting out of the house, she supposed the defendant did not know. Witness did not try to get defendant to surrender his pistol until after the second shot was fired. When Coulson came up he asked defendant what he was doing. Defendant replied that he was trying to shoot Brown for insulting his wife. Defendant got the pistol somewhere in town, but witness did not know where. It was a fact that defendant sold a pistol about two months before the homicide, and borrowed it that afternoon. Defendant did not tell witness that he had done so.

Q. "Did you not swear once that your husband owned the pistol and told you that he had sold it to E. C. Lewis about a month before, and borrowed it from him that evening?"

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A. "Yes, sir, I did."

Q. "Is it not a fact that your husband told you he had sold the pistol to Ed Lewis about a month before and got it from him that afternoon?"

A. "Yes, sir. My husband must have been on the premises twenty-five or thirty minutes before he left. He did not know, when he left, that Brown had been fatally shot."

Q. "You did not tell him, up to the time that he left, that Brown was shot?"

A. "I did; but he did not know that Brown was fatally shot. I said to him: 'I think you hit Jimmy, and you had better go away, because, if you should meet him, there would be a difficulty and you might get killed.' Coulson then had his pistol, and he had nothing to defend with. I wanted to get him out of the trouble. I did say that I told Captain Hughes about this transaction on the next morning. I said that I told Mr. Hand. I know Captain Hughes and R. B. Alexander. They came to my house on the evening after the homicide, and I made a statement to them, which was true as far as it went."

Q. "Did you claim to them at that time that deceased went to your room and made an indecent proposal to you—a proposal to go to bed with him."

A. "I did not."

Q. "Did you testify in this case before the coroner's inquest?"

A. "That is my signature. I said all that is set forth in that document, on the seventh day of May, 1886."

At this point the State read in evidence the written testimony of Mrs. Williams, taken at the inquest. It reads as follows: "I am the wife of Louis V. Williams. Jim Brown came over next to my room and began to swear. I told him: 'Jim, please don't swear that way,' and he says, 'I don't give a God d—n. If you don't like it you need not take it.' I said, 'Jim, how can you talk that way?' and he said, 'Well, that's my way.' My husband went to town with the milk wagon when this happened. When he came home I told him what Jim had been saying; and when they were all sitting at the supper table, about half past seven o'clock, my husband came in and said: 'Jim, I heard you have been cursing my wife; is it so?' He said: 'Yes, I did so.' Brown was sitting at the table when he said so, when my husband reached his hand behind to get his pistol, and shot him just as Brown got up from the table, and Brown threw his hand to his shoulder and said, 'Oh,' and went into the next room. Brown

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had been working about two months with Mr. Coulson. He lived about three hours after the occurrence. After the first shot, my husband followed Brown and fired a second shot, but I pushed up his arm and he fired into the air, and I took the pistol away from him.

"After that he left and went toward town. My husband owned the pistol now shown me, but told me that he had sold it to E. C. Lewis about a month ago, and this is the identical pistol that the shooting was done with."

Q. "You were sworn to testify upon the investigation in the coroner's court when you made that statement?"

A. "I was sworn to testify who did the shooting."

Q. "You were sworn to testify upon the coroner's inquest?"

A. "Yes, sir; I was. This was the next day after the shooting, but I don't remember whether morning or evening. I saw Captain Hughes and Mr. Alexander on Coulson's premises on May 8, and made a statement to them."

Q. "Did you tell them that deceased went to your room and made to you the indecent proposition to go to bed with him?"

A. "I did not. They asked me about the shooting, and how it was done. They did not ask me why it was done, and I did not tell them."

Q. "Did you not state to them as follows: 'Jim Brown came over to my room and began to swear'?"

A. "Yes, sir, I told about the swearing."

Q. "Did you not tell them that you said to Brown: 'Jimmy, please don't swear that way'?"

A. "Yes, sir; I told them that."

Q. "Didn't you tell them he said: 'I don't give a God d—n'?"

A. "I think I did."

Q. "Didn't you also say that he said: 'If you don't like it you need not take it'?"

A. "I don't remember whether I told them that or not. That is my statement before the coroner's inquest."

Q. "Did you not tell them that you said: 'How can you talk in that way?' and he said: 'Well, it's my way'—didn't you tell them that?"

A. "I don't remember if I told them that or not. I told them that my husband went to town with the milk wagon when this thing happened. I told them that when he came home I told him what Jimmy had been saying. I told them that they were all sitting at the table when he came in and said: 'Jimmy, I

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heard you have been cursing my wife,' and that Brown was sitting at the supper table when he said so."

Q. "And did you tell him that your husband reached his hand behind him to get the pistol, and shot just as he got up from the table?"

A. "No, sir; I did not so tell Mr. Hughes. I told him that he was standing at the side of my room, and showed him the very place. I did not tell him just when Brown got up. I suppose I testified so before the coroner."

Q. "Did you not say that Brown threw his hand to his shoulder, said 'I am shot,' and went into the next room?"

A. "That was my statement to the coroner, not to Mr. Hughes."

Q. "Did you not tell him that after the first shot your husband followed Brown and fired a second shot, and that you pushed up his arm and he fired into the air?"

A. "Yes, I told him all of that."

Q. "Did you tell him that you took the pistol away from your husband, and that he afterwards went off towards town?"

A. "I don't remember whether I did or not."

Q. "You did not tell him, as you have testified here, that Brown came to your room at half past three in the morning, and wanted to get in bed with you?"

A. "No, sir."

Q. "Nor did you state it on the coroner's inquest?"

A. "No, sir; I did not. It is a fact that the first time I made that statement about his coming to my room was some time afterwards, on the habeas corpus trial. I don't remember how long that was after the homicide."

Q. "Do you know Mrs. Coulson? Did you or not, between the homicide and the habeas corpus trial, have a conversation with Mrs. Coulson about this case? If so, was or was not your testimony, to be thereafter given on the habeas corpus trial, reduced to writing?"

A. "Mrs. Coulson noted down for me a few facts she thought I might need to refresh my memory. She took them down for my use and benefit, and as I gave them to her, but I did not see them."

Q. "Did you then give to Mrs. Coulson a correct statement of the whole transaction?"

A. "No, sir; I did not."

Q. "Did not Mrs. Coulson take the notes down for you at

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your request, and did you not tell her that you had never been in court, and that you wanted to state the affair exactly as it occurred?"

A. "No, sir; I did not make any such request of Mrs. Coulson. She offered herself. Mrs. Coulson came to me and asked if I did not think it would be a good idea to take down a few notes from which to refresh my memory, and I told her I thought it would. I first thought at that time that I would tell her the whole thing, but reflecting that she might tell Mr. Coulson, I decided not to do so. Mrs. Coulson took down those notes before I went before the grand jury. I destroyed them."

Q. "Did you, when Mrs. Coulson was making those notes, claim to her that deceased went to your room and made indecent proposals to you?"

A. "No, sir; I did not."

Q. "Did you ever claim it to any one before you went upon the stand in the habeas corpus trial?"

A. "I told my sister-in-law, Mrs. Cox, a few days before the habeas corpus trial. She was the first person, except my husband, to whom I told it. I didn't remember telling Mr. Coulson anything at all. I don't know how many conversations I had with Mr. Coulson about this matter, but not several. I talked to Mrs. Coulson more than twice about it, but never told her anything about the indecent proposition. I had decided not to tell that part of the transaction until I could tell it from the stand on the trial. I was advised to do so by Mr. Hand. I saw Mr. Hand on the morning after the homicide. Pretorius, "Johnny" and Mitchell occupied the room. I had not been to bed at all on the night of the sixth. I suppose Pretorius was in the room next to where Brown was talking. I don't know whether Howell was in the next room or not. Dyall was not. I think John Fuchs was in there. Allen Sharpley slept in a room about one hundred and fifty yards from the house. Neither Gilbert, Swaggerty nor Nolan were there."

Q. "To whom, then, was Brown talking when he said that he would not work for any son of a bitch who would make him get up at three o'clock in the morning?"

A. "He was talking to Pretorius and Johnny, and, I suppose, was talking of Mr. Coulson. A plank partition divided my room from theirs. Pretorius and Johnny slept there, but Brown did not. When deceased came into my room, I presume that Pretorius and Fuchs were at the dairy. I don't think they

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were in the room, though they may have been. I never claimed in any conversation I ever had with Coulson, Hughes or Alexander that Brown ever came into my room. Nor did I so state on the coroner's inquest. Pretorius, Howell, Dyall, Fuchs, Sharpley, Swaggerty, Mitchell and Brown had breakfast at my house that morning at about seven o'clock. Nolan did not eat breakfast then. We had dinner at two or half past two o'clock. I did not see Brown between dinner and supper, and suppose he was at his work. He worked at Coulson's house. Brown was on the place when my husband got home at noon, but I did not see him when my husband left after dinner, which was about half-past two. I suppose that Brown was then at Coulson's house. My husband kept his team at the dairy stable, about thirty yards from Coulson's house. Brown's work was about that stable. Defendant had his dinner before the men did. They came to dinner soon after defendant left. Dinner was two hours or more late on that day. The men were not through milking when defendant ate his dinner, and did not come to theirs until they finished milking. Up to that day Hand had charge of the dairy, but on that day Mr. Coulson took charge. Brown had got up from the supper table when he was shot. I don't remember how long Pretorius worked at the dairy after the homicide, but not long. 'John Fuchs stayed but a few days; Sharpley but a few days. Swaggerty was driver of the water wagon, and was not in Coulson's employ. He quit boarding at witness's house on the eighth. Mitchell stayed there two or three weeks, but left before the habeas corpus trial. I don't know what has become of any of these men. I don't know that any of them were or were not at the habeas corpus trial."

On her re-examination, the witness said that she said nothing about Brown going to her room because she was ashamed of it, and thought it enough for her husband to know it. She went in person to Coulson, after the shooting, to get money. Mrs. Coulson was then in Austin. She knocked at Coulson's door, and told him she was in trouble and wanted money. Coulson replied that he had none, but would look around for some. He then gave witness sixty-five cents and said: "God knows if I had more I would give it to him. Tell Louis to fly the country." On the next day Mr. Hand told witness not to tell a part of this transaction, and witness was too mortified and ashamed to want to do so. Mrs. Coulson suggested the making of the notes testified about on the cross examination. Witness did not know what

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had become of those notes. Some sort of business change made dinner late on May 7. The witness protested that she told the truth in her statements to Coulson, Hughes and Alexander, as far as she went, but kept back everything she didn't want them to know.

Re-crossed, the witness said that she was placed on the stand at the coroner's inquest, but nobody asked her any questions, except to tell how the killing took place. She told about the cursing as it appears in her written testimony. They did not ask the witness the cause of the shooting.

On re-examination, the witness was asked if, in answer to questions or by voluntary statement, she stated to the coroner that "Jimmy Brown came over next to my room and began to swear." Witness answered: "They asked me to tell how the killing took place, and who did it. I don't think they said anything about 'everything about it.' I was nervous and excited, and there were parts I did not want to tell. I don't remember what the coroner said in administering the oath. I presume I was sworn. I don't remember whether he told me to tell all about it or not. He asked me to tell about the shooting."

Q. "Did he tell you to tell all about it?"

A. "As far as I can remember so. I know I had to tell something. I know exactly what is in that paper. I told the coroner exactly as it is in there."

Q. "After you had taken the oath to tell all about it, did you purposely suppress what you have testified here to-day?"

A. "Yes, sir; I did."

Raymond J. Hand was the next witness for the defense. He testified that on the fatal day he was residing on West Houston street, in San Antonio. He was not then in any real way interested in matters at Coulson's dairy, though he had been, until a few days before, one of the renters of Coulson's dairy. He knew Coulson, Mrs. Williams and defendant. He saw Mrs. Coulson on the day after the homicide. The witness was here asked if Mrs. Williams on the day after the homicide made any statement to him about it. The question was objected to by the State, and the objection was sustained by the court.

The defense closed.

Allen Sharpley was the first witness called by the State in rebuttal. He testified, in substance, that he was at defendant's house on the night of May 7, 1886, and saw the firing of the first shot by defendant. Witness was sitting at the supper table when

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that shot was fired. A short time before that, the deceased was sitting at the same table, directly opposite the witness. The defendant, at the time the shot was fired, was standing in the kitchen door. Referring to the immediate shooting, the witness said: "As he was passing through the door from the dining room into the main part of the house at which Mr. Williams lived, the pistol was fired just as he was passing from the dining room into the house. When he was shooting Brown, he went out through the door he started through. To the best of my knowledge, Williams went out at the door he came in. I don't know positively, because as the pistol went off I went out at the window, and the next I saw of Williams was on the other side of the house. He could have met me there coming out of the other door, but I was of impression that he went out the door he came in. I was close to the window I went out of. I kind of rolled up and rolled out—getting out the quickest and best way that I could. As the room was small, I did not know in which direction the bullets might go—and I was kind of scared, and didn't want any chances. But few minutes elapsed after the shots before I met Williams again. I asked him not to shoot me. He asked: 'Where is the d—d son of a bitch?' I told him I didn't know; and that was all that was said. But few moments after I rolled out of the window a second shot was fired. When I first saw Williams, after I got out of the house, he was alone. Mrs. Williams was not with him."

Cross examined, the witness said that he did not see Coulson at or about the time of the shooting. He could say nothing about Mrs. Williams getting or trying to get hold of defendant's arm when the second shot was fired, as at that time the corner of the house was between him and Williams. He saw Mrs. Williams a very short time after the second shot was fired. Witness had a conversation with Brown about his imputed conduct to Mrs. Williams. Witness had heard that Brown had cursed in Mrs. Williams's presence, and asked Brown about it. He did not deny it. Witness advised him to apologize to Mrs. Williams. Brown merely replied that, when a lady got out of her place with him, he would get out of his place too. He said, also, that if defendant said anything to him about it, he would merely ask him in a polite manner not to do it again. Witness told Mrs. Williams that he had tried to get Brown to apologize to her, but did not tell her that Brown said that if defendant did not like it he could shoot it out. Witness heard nothing about Brown ask-

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ing Mrs. Williams to go to bed with him, and of course said nothing to Brown about that. His conversation with Brown referred alone to Brown's cursing in the presence of Mrs. Williams.

Mrs. S. E. Coulson was next introduced by the State in rebuttal. She testified, in substance, that she was in the city of Austin when the tragedy occurred. She returned to San Antonio on the first train after it happened, and Mrs. Williams came to see her as soon as she got home. She undertook to narrate to witness the facts attending the shooting, but was so distressed that she talked incoherently, and witness advised her to postpone her disclosure to another time. She came back next day and made what purported to be a detailed statement of the tragedy. Witness asked her if she had related all the incidents upon the inquest as she had to her. Mrs. Williams replied she had not, as she was too much excited and disturbed to think of them. The witness then told Mrs. Williams that her duty to her husband demanded that she should tell everything that would be of advantage to him, and proposed to note down for her, under appropriate heads, all facts pertinent to the case to which she could testify. These notes she designed for the use of Mrs. Williams when she should go on the stand on the habeas corpus trial. The proposal to make the notes was made by witness. Mrs. Williams not only did not claim to witness that Brown insulted her by making improper advances toward her, but, in reply to witness's direct question whether or not he attempted indecent overtures, she denied it positively. Witness had known Mrs. Williams ever since she came to Texas, and regarded her as one of the purest women she had ever known. She was friendly to Mrs. Williams at the time of and before the homicide, was friendly to her now, and hoped and expected to regard her as a worthy friend always.

David Coulson, recalled by the State, in rebuttal, testified that, soon after the shooting, Mrs. Williams either came to, or sent to him for money. Witness thought she came herself. He gave her sixty-five cents, which was all the money he had except his funds in the bank. He did not tell her that he would give her or defendant more if he had it, nor did he tell her to tell defendant to fly the country.

The defendant's first bill of exceptions recites the excluded evidence which is the subject matter of the second head note of this report. That bill shows the defense proposed to corroborate

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the testimony of Mrs. Williams by proving by the witness Hand that, on the morning after the homicide, Mrs. Williams, after telling him about the cursing of deceased, said to him, witness Hand, that there was much more she would like to tell him, but was ashamed to mention it to a man, whereupon the witness Hand told her that, if deceased had insulted her by making indecent proposals to her, not to mention that fact to any one at that time; that a proper time to tell it might come, and she had better wait for that time.

Teel & Haltom, filed an able and exhaustive brief for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. In this case it is conclusively shown by the evidence, and is not controverted by the defendant, that the homicide charged was committed by the defendant, and that it was an unlawful homicide. But it is contended by the defendant that he is not guilty of a higher grade of homicide than manslaughter, and has been illegally and unjustly convicted of murder in the second degree.

To reduce the homicide to manslaughter, the defendant relies upon insulting language used by the deceased to defendant's wife, the defendant not being present at the time of such insult, but, having been informed thereof, killed the deceased thereafter, on first meeting with him.

Defendant's wife testified on the trial that deceased cursed her and made an indecent proposal to her, that is, proposed that she should get in bed with him; that her husband, the defendant, was absent at the time; that, when her husband returned home on the same day of the insult, she informed him of the insult, and on the evening of that day the homicide occurred. The insults and the homicide were in defendant's house, where deceased at the time was boarding. Upon cross examination by the State of the defendant's wife, she admitted that in statements made by her about the cause of the homicide, to Hughes, Mrs. Coulson and to the coroner's jury, she had not mentioned the fact to which she testified on the trial, that the deceased not only cursed her, but that he made an indecent proposal to her. She stated that she had not told any one about said indecent proposal except her husband and her sister-in-law, but had intimated it to Mr.

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Hand in narrating the facts to him, and that he advised her not to tell it to any one until the proper time arrived, and that she did not tell it until she testified as a witness on the habeas corpus trial of the case.

Having elicited from the witness these admissions, the State, over the objection of the defendant, was permitted to prove by Mrs. Coulson that the witness had detailed to her the circumstances of the homicide, and had not mentioned the said indecent proposal of the deceased, but, when asked if any such proposal had been made, "denied everything of the sort."

It is insisted by counsel for the defendant that this portion of the testimony of Mrs. Coulson was improperly admitted. In our opinion, the testimony was not admissible. "A witness called by the opposing party can be discredited by proving that on a former occasion he made a statement inconsistent with his statement on trial, provided such statement be material to the issue.

* * * And a witness may be discredited by proof that he now states facts which, on a former trial, he omitted to state. And generally, whenever, on a former occasion, it was the duty of the witness to state the whole truth, it is admissible to show that the witness, in his statement, omitted facts sworn to by him at the trial. But it is only upon a denial, direct or qualified, by the witness, that such statements were made, that proof of them can be made." (Whart. Cr. Ev., secs. 482, 483.)

Now, in this case, the witness sought to be impeached not having denied, but having expressly admitted, that she omitted to tell Mrs. Coulson about the insulting proposal testified to by her on the trial, the testimony of Mrs. Coulson in regard thereto was unnecessary, immaterial and improper, and might have produced an unfavorable impression upon the minds of the jury in weighing the testimony of Mrs. Williams. We think it was error, and can not say that it was not material error, to admit said portion of Mrs. Coulson's testimony.

In rebuttal of the impeaching testimony introduced by the State attacking the credibility of the statements testified to by Mrs. Williams as to the indecent proposal made to her by the deceased, the defendant proposed to prove by Mr. Hand that, soon after the homicide, Mrs. Williams had stated to him that the deceased had cursed her, and that deceased had said and done a great deal more than she would like to tell him, witness, but that she was ashamed to mention it to a man, and that he told her that, if the deceased had insulted her by indecent pro-

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posals, not to mention it to any one—that a time might come for her to tell it, but to wait for that time. This proposed testimony was objected to by the State upon the ground that it was not competent for the defendant to prove that the witness had made statements corroborating her testimony on the trial. The objection was sustained and the defendant excepted.

We are of the opinion that the testimony was competent. It has been held by this court, upon the weight of authority, that an impeached witness may be corroborated by proof that he had made the same statements at other times as those testified to by him on the trial, and about which he was impeached. (*Bailey v. The State*, 9 Texas Ct. App., 98.) The proposed testimony of Hand would show that Mrs. Williams, on the next morning after the homicide, intimated to him that the deceased had not only cursed her, but had made indecent proposals to her, and to this extent corroborated her testimony on the trial. Hand's testimony also tended to explain why it was that Mrs. Williams had not told Mrs. Coulson and others about said indecent proposals. Mrs. Williams was the defendant's most material witness. Upon her testimony, and the credit which might be given it by the jury, depended the grade of his offense. It was of vital importance to him that her testimony should go before the jury free from suspicion, and it was his right, if he could do so, to remove by rebutting evidence any doubt or discredit which had been cast upon it by the impeaching evidence of the State. For this purpose we think the rejected testimony of the witness Hand was competent and material, and that the court committed material error in excluding it from the jury.

On the trial an exception was taken to the charge of the court on manslaughter, which exception, we think, must be sustained. The charge complained of instructs the jury that, to reduce the homicide to manslaughter, among other things, the provocation upon which the defendant acted must have arisen at the time of the commission of the offense. Under the facts of this case, this instruction was erroneous. In cases like this, it has been repeatedly held that the requirement of article 594 of the Penal Code, that the provocation must arise at the time of the killing, and that the passion be not the result of a former provocation, is inapplicable, and should not be given in charge to the jury; but that, instead thereof, the jury should be instructed that the time intervening between the slayer's appraisal of the insult and his first meeting with the deceased is not a ma-

Syllabus.

terial consideration, provided the adequate cause be shown, and the state of the slayer's mind predicated thereon, did actually exist at the time of the killing. (Willson's Texas Crim. Laws, secs. 1009, 1022; and see particularly Eanes v. The State, 10 Texas Ct. App., 421, in which case the proper issues to be submitted to the jury in a case like this are clearly stated.)

Another exception made to the charge of the court is that it prescribes the forms of verdicts of guilty of murder in the first and second degrees, but omits to prescribe any form for a verdict of guilty of manslaughter, or for a verdict of not guilty. In this respect the charge is imperfect, but perhaps not materially so. It is not essential to the sufficiency of the charge that it should instruct the jury in the forms of verdicts which may be rendered by them, though it is very proper, we think, to do so. But when such instructions are given, they should embrace every verdict which might be rendered in the case, so as to avoid conveying to the minds of the jury any impression as to the opinion of the court as to which of several verdicts should be rendered.

Other exceptions to the charge are urged by counsel for defendant, but are not, in our opinion, well founded. In other respects than those we have mentioned, we think the charge is unobjectionable.

Because of the errors discussed the judgment is reversed and the cause is remanded.

Reversed and remanded.

Opinion delivered February 1, 1888.

34	667
38	212
28	600

No. 2351**F. THUMM v. THE STATE.****1. PRACTICE—CHARGE OF THE COURT—MANSLAUGHTER—SELF DEFENSE.—**

Among the well established rules which, under our practice, apply to the charge of the court, are the following: 1. The charge of the court is always sufficient if it distinctly sets forth the law applicable to the evidence; and it is only necessary to give such instructions as are applicable to every legitimate deduction to be drawn from the facts in proof. 2. The charge must be tested by the evidence. 3. If, in homicide cases,

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the issue of self defense is not *fairly* raised by the evidence, no charge upon that issue should be given. 4. In the absence of evidence tending to establish, or to raise a doubt, as to whether the homicide be of a lower grade than murder, it is unnecessary and improper for the court to charge upon manslaughter. See the opinion in extenso and the statement of the case for evidence *held* not to raise the issues of manslaughter or self defense; wherefore the omission of the trial court to charge upon those issues was not error.

2. **SAME—THE DOCTRINE OF SELF DEFENSE**, which applies to a defensive, and not an offensive act, and which is limited to necessity, and can not exceed the bounds of mere defense and prevention, will not avail a slayer who, by his own wrongful act, brought about the affray or produced the necessity for taking the life of the person slain, in order to protect his own life. In other words, if a person voluntarily engages in a combat, knowing that it will or may result in death, or some serious bodily injury that may produce the death of his adversary or himself, he can not claim that he acted in self defense. Note a state of case to which the rule applies. Note also that the evidence does not present the doctrine of imperfect self defense.
3. **MURDER—FACT CASE.**—See the statement of the case for evidence *held* sufficient to support a conviction for murder in the second degree.

APPEAL from the District Court of Kendall. Tried below before the Hon. T. M. Paschal.

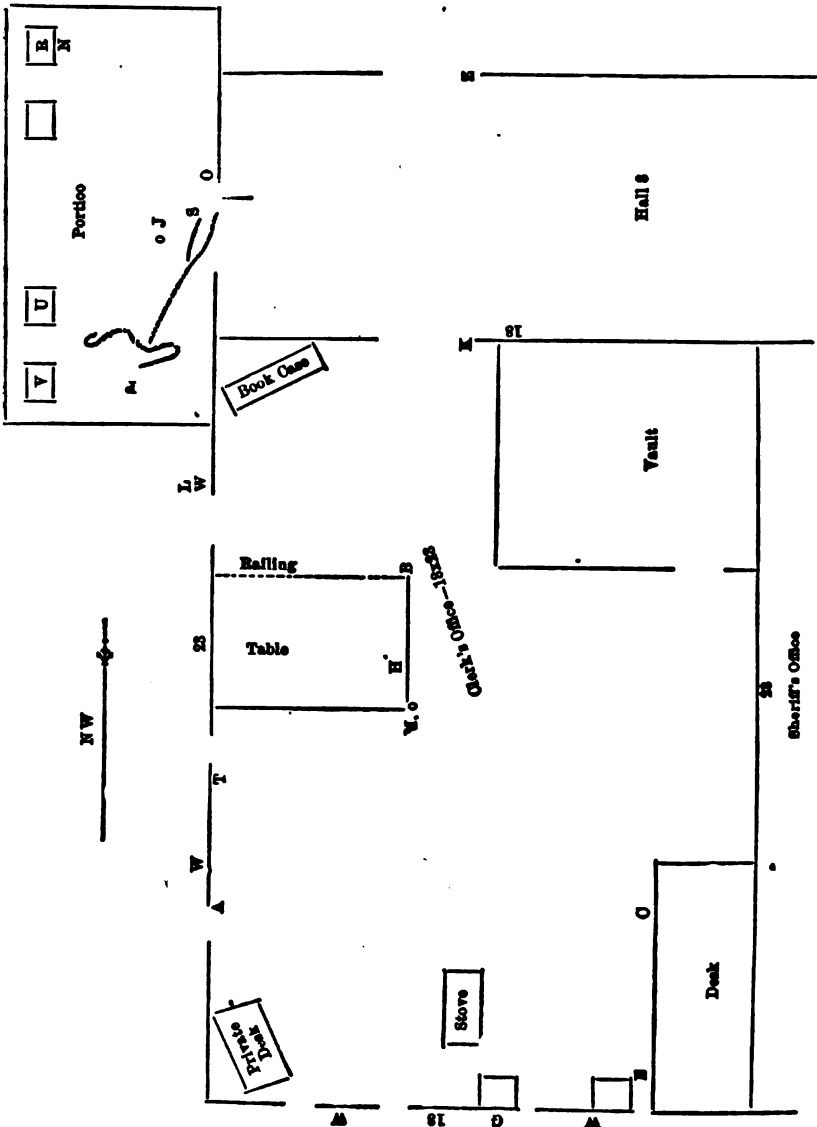
Appellant was indicted in Medina county, Texas, charging him with the murder of J. W. Hildebrandt in that county, on the twenty-second of June, 1887. The court, of its own motion, changed the venue to Kendall county. Trial was had there at the October term, 1887, resulting in a verdict of guilty of murder in the second degree, and punishment was fixed at a term of twenty-five years in the penitentiary.

Joseph Kempf was the first witness for the State. He testified that on the day of the homicide he was deputy to his son, August Kempf, who for three years had been district and county clerk of Medina county. Prior to the election to that office of August Kempf, the witness himself had held it for a number of years. Witness's general occupation was to attend to the duties of the county clerk's office. The witness knew the defendant, who, for about three years prior to the homicide, had been sheriff of Medina county. He also knew the deceased, J. W. Hildebrandt, in his life time. For two years prior to his death the said J. W. Hildebrandt was a citizen of Medina county, but, having removed to San Antonio, in Bexar county, was a citizen of that county at the time he was killed. The plat now offered in evi-

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dence is substantially a correct plat of the county clerk's office in Castroville, Medina county, Texas. * It shows the hall of the court house and the front porch of the same, the sheriff's office and the assessor's office and the foot of the stairway which leads down from the district court room (up stairs) to the court house hall below. The plat is as follows:

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Continuing, the witness Kempf testified that, at a few minutes past eleven o'clock on the morning of June 22, 1887, while he was sitting at his desk in the right hand corner of the clerk's office, furthest from the hall door, the deceased came in and asked for the records. Witness told him that the record books were in the vault where they were usually kept. He went into the vault and presently came out with one of the large record books, which he took to the desk in the left hand corner of the office furthest from the hall door. He placed the record book on that desk, seated himself in a chair, and proceeded to examine certain deeds recorded in said book. He sat at that desk with his back toward the witness and his side face towards the door. Witness was sitting at his desk with his full face to the door. About ten minutes after the deceased took his seat at the left hand desk, and while he was still sitting there, and while witness was still sitting at his desk, the defendant entered the clerk's office from the hall, through the hall door. He passed through the space between the table and the vault as shown on the plat, stopped and looked at witness for a moment, without speaking a word, and then approached the deceased from behind, in his usual gait, and began striking deceased over the head with his fist. Witness could not say how many blows defendant struck deceased with his fist. The blows were accompanied by a mumbling sound, but witness could not say which of the two parties made that noise, nor what, if anything, was said by either of the parties. When the defendant first struck deceased, deceased turned his head as if to look back and see what was the matter, and raised his hands as if to ward the blows off his head. He then attempted to rise from his chair, and partially fell between his chair and the window, which was at his right hand, whereupon the defendant seized a glass mucilage bottle from the window sill, with his right hand, which was a quart bottle and about half full of mucilage, and struck the deceased over the head, from behind with it. At about the second blow the bottle was shattered, but defendant continued to strike the deceased with that part of the bottle which remained in his hands, as long as he could hold it. This all transpired in a very few moments. The deceased finally succeeded in gaining his feet, and in a stooping posture went staggering towards the door which led from the clerk's office to the hall, the blood streaming from his face and side of his head. Defendant followed within two or three feet of deceased. When

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the deceased reached the end of the table opposite the corner of the vault, as shown in the plat, he fell, but got up and staggered out of the office into the hall, through the front or hall door. Thence he turned to the left, towards the door of the hall which led to the porch, and disappeared from the view of the witness. Defendant followed the deceased closely until he, defendant, reached the door which leads from the office into the hall. Stopping at that door, with his body and feet inside the office, he rested his left hand on the inside facing of the said office door, and leaned forward his head, with his right hand hanging down by his side. He then had nothing in his hands. He turned his face to look towards the door which leads from the hall to the porch, towards which the deceased went a few minutes before, and at that time the witness heard the report of a pistol fired from the direction of the porch door. Defendant at once drew his pistol with his right hand, and, still standing in the position described by witness, fired a shot towards the front porch door. That shot was followed instantly by another shot from the direction of the porch door. Defendant then stepped into the hall and went towards the porch door. Witness retained his seat at his desk during the whole of the difficulty, which occupied but few moments. Deceased made no attempt whatever to strike the defendant while the two were in the clerk's office. On the contrary, he occupied himself in attempting to escape from the defendant.

The wall which divided the clerk's office and the hall was of solid stone, about eighteen inches thick. The deceased, standing at the front hall door leading to the porch, could not possibly have fired to strike the defendant's body in the position occupied by the defendant at the time of the shooting, though a shot fired from the porch door could have struck him in the head or on the arm, when he was leaning forward. After the shooting was over, the witness discovered blood upon the open record book from which deceased was making notes when attacked; and there was blood, mucilage and fragments of glass in the corner of the room where the striking was done. A trail of blood led from the desk in the left hand corner of the office to the point between the table and vault, where deceased fell as he passed out, and thence through the office door into the hall, and thence up the hall toward the front or porch door. There was the print of a bloody hand on the facing of the door at the point where the defendant rested his left hand at the time of the shooting. It

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did not look like it was made from blood flowing from a wounded hand. No person other than witness, defendant and deceased was in the clerk's office at the time of the difficulty. District court was in session up stairs.

Cross examined, the witness said that he was neither reading nor writing when defendant came into the office. He was merely sitting at his desk facing the door, which was the only door leading into the office. Defendant did not speak to witness, and looked at him but a moment after he stopped on the floor before going over to the desk at which deceased was sitting. Deceased at that time was sitting with his back to witness, and his face to the wall, which threw his side face to the door, with the door a little behind him. After striking the deceased with the bottle until it was shattered, the defendant said nothing to deceased, nor did he do anything to deceased except to follow behind him as he staggered out of the office. Defendant could easily have struck deceased many blows as he retreated from the office, but refrained voluntarily, and permitted him to leave the office without further interference. The deceased was beyond the view of the witness at the time of the shooting, and witness saw nothing that was done except what was done, in the manner stated, by the defendant, at the office door. The distance across the clerk's office from the door to the back wall was twenty-three feet. It was some further from that door diagonally across to the corner where the attack upon the deceased was made. The witness knew Mr. W. N. Parks, the county attorney of Medina county. He had no recollection of seeing Parks within a short time after the shooting, but he may have done so. He did not, however, make to said Parks any such statement as the following: "When the defendant came into the clerk's office on June 22, 1887, he started to the vault and then asked me where August was, and I told him I did not know. He then went over to where Hildebrandt was and said to him: 'Are you hunting up some more indictments against me?' Hildebrandt then jumped up and Thumm reached over and got the mucilage bottle and struck Hildebrandt over the head with it." The statement that witness ever told Mr. Parks any such thing was false.

Witness knew Mr. William Schweer, and may have met and talked with him on the porch of the court house on June 27, 1887, but he had no recollection of doing so. But if he did, he did not, in reply to Schweer's question about the killing, tell him

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that "I was sitting at my desk in the office when Thumm came in and asked me where August was, and I told him that I did not know. Hildebrandt was then sitting at the other desk, and Thumm went to him and the two talked together. Then while they were talking Hildebrandt jumped up, and then Thumm hit Hildebrandt, and then Hildebrandt went out of the door of the clerk's office and into the hall of the court house, and then on to the porch or gallery, and went toward the window of the court house nearest to the porch, and I believe that Hildebrandt wanted to shoot through that window. Then Thumm stepped out of the clerk's office into the hall, and Hildebrandt then shot into the hall." Witness denied that he showed Schweer where one of the bullets pierced the wall near the front hallway door on the outside, and where another struck the wall near the hallway door on the inside. He denied that he showed Schweer how deceased went from the porch toward the window. He did not tell Schweer that he thought Hildebrandt wanted to shoot through the window. The statement that he told Schweer any such things was a lie. Witness declined to tell anybody what he saw and heard until he told it in court. Deceased said nothing to defendant after being hurt; he left the table at which he was sitting when attacked. Had he said anything, the witness, who was then but two or three steps distant, would have heard it.

Doctor William Boll testified, for the State, that he was called as a surgeon to attend Hildebrandt some ten or fifteen minutes before his death. Hildebrandt died from the effects of a gunshot wound. The ball entered the forehead near the roots of the hair, and penetrated the brain. There were three other wounds on the body. Two were contusions on the head, one made, evidently, by a heavy blunt instrument, and the other by a sharp instrument. Neither of these wounds contributed to the death of Hildebrandt, but must have dazed him slightly, for a short time. The remaining wound was a scratch on one knee.

Sam Lindley testified, for the State, that he was standing on the porch of the Medina county court house in Castroville, on the morning of June 22, 1887, when the fatal difficulty between defendant and Hildebrandt took place. Pingenot and Hornung, and some other parties whom witness could not now remember, were standing on the same porch at the time, to the left of witness, and nearer the window opening from the clerk's office than the witness was. Witness heard a noise in the clerk's office which prompted him to go into the hall, and to the door which

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leads into the clerk's office. When he got to that door he saw Hildebrandt in the act of rising from the floor at a point between the table and the vault in the clerk's office, as shown on the plat in the evidence. Joseph Kempf was then near the desk in the right hand corner of the room, and defendant was standing near and in front of Hildebrandt, while the latter was trying to get up from the floor. Witness took in the situation at a glance, and left at once, passing rapidly out at the front door, across and from the porch, and to a point on the ground outside, and opposite the hall door. At this point witness turned and saw Hildebrandt as he reached the point in the hall within a few steps of the portico, where he put one of his hands to his head and made a remark which witness did not understand. Just as Hildebrandt reached the portico he turned suddenly, pulled his pistol, and fired down the hall way. Witness took about two steps to the left and heard two shots fired almost simultaneously, and saw Hildebrandt fall. Hildebrandt was in the doorway leading from the hall to the porch when he drew his pistol. He wheeled and fired just as he reached the portico. Hildebrandt died on the porch, and as the witness supposed, from the effects of the shot.

Cross examined, the witness said that when he stepped to the door and looked into the clerk's office and saw Hildebrandt on the floor, he observed that as much of his person as his head was under the table. He was then struggling to get to his feet, and defendant was standing in front of him. As the witness, leaving the court house, passed from the hall to the porch, August Hornung passed to a place on the porch to the right of witness. Witness at the same time saw Pingenot, who had gone about twenty steps in the direction of the gate. Witness did not look back into the hall until he got to the ground from the porch. Hornung was very little to witness's right when witness passed from the hall to the porch. He could not say where Hornung was when he turned and saw Hildebrandt coming from the hall to the porch. Hildebrandt was very near the porch door when witness turned. He was then in the act of pulling his pistol. He pulled and fired it very quick. He was not then standing quite erect. Defendant was not molesting the deceased when witness saw them in the clerk's office, nor did either of them speak a word that witness heard. There was nothing between Hildebrandt and the door to prevent him from going into the hall.

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Ed DeMontel testified that he was a lawyer, and a member of the Castroville bar. The case of Volmar v. Ihnken was set for trial in the district court of Medina county on the morning of June 22, 1887. The deceased, who was the attorney for the plaintiff in that case, arrived in Castroville about fifteen minutes past ten o'clock on that morning. A short time after his arrival the witness observed him in the court room up stairs, leaning against the bar railing, talking to his client. The defendant was then sitting in his little private office in the court room, near the judge's bench. Defendant left his little office and walked to a point about one step beyond the deceased, when he stopped, turned his head towards deceased, and then wheeled and faced deceased for a moment. Neither defendant nor deceased spoke a word, and defendant presently walked back into the little office whence he came. Court had convened, but witness was not certain whether or not the judge was on the bench at the time. The deceased did not appear to notice defendant when the latter wheeled and faced him, but continued his conversation with his client. The witness could not state positively whether it was the deceased or Volmar that defendant looked at, defendant's back at that being towards witness. After the shooting was over, the witness went down stairs and found Hildebrandt lying on the gallery gasping and groaning.

August Hornung, assessor of Medina county, was the next witness for the State. He testified that, a little after eleven o'clock on the morning of June 22, 1887, he closed his office in the court house at Castroville and walked to the porch in front. He observed Pingnot and Nestor standing a little to the left. A few minutes after witness took his stand on the porch, his attention was attracted by a noise issuing from the clerk's office. He then saw Pingnot go to the window looking out from the clerk's office, and started to that window himself. On his way to the window he met Pingnot coming from it, saying something that the witness did not understand. Reaching the window, the witness looked through it and saw Hildebrandt standing with his back to witness, facing the defendant, and at this time he heard Hildebrandt, who had his hands up, say to defendant: "Please don't kill me." Defendant replied: "Yes, d—n you," and striking the defendant in the face with his fist, knocked him under the table at the end near the corner of the vault. Witness could not say positively that the blow knocked Hildebrandt under the table, but upon receiving the blow Hilde-

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brandt fell, and was hidden from witness's view by the table. Witness took but a brief view of the situation through the window, and then walked rapidly to and across the porch, and to the post on the same which stands on the right going out from the hall. About the time witness reached the post he turned around and saw Hildebrandt step from the hall door to the porch, with his pistol in both hands. He turned to the right instantly and fired down the hall. Instantly, and almost simultaneously, two more shots were fired, and Hildebrandt fell. Witness stepped off the platform when Hildebrandt fired down the hall, and stood behind the porch post until Hildebrandt fell. Then, keeping himself screened from the door by the post, the witness walked to a point from which he could see Judge Joseph Kempf sitting with his arms in the window. Witness then crossed the porch and went into the clerk's office and found Judge Kempf weeping. Hildebrandt's first shot was fired as soon as he stepped about two feet beyond the hall door on the porch. The other two shots were fired while witness was stepping from the platform to the point behind the post. Hildebrandt's face was very bloody when he appeared at the hall door with his pistol in his hand. The defendant came to the hall door directly after Hildebrandt fell. A short time afterwards, the witness saw him standing in the hall, between the front hall door and the door leading into the clerk's office. As the witness went to the window, on first hearing the noise in the office, he saw Sam Lindley pass to his left. This witness testified substantially as did Judge Kempf about the blood in the clerk's office, and, in addition, that he found blood under the table where he saw defendant knock deceased down. Witness afterwards examined the porch under order of the court, but could find no blood nearer that edge of the porch towards the window than six or eight inches. That blood did not extend to the edge of the porch.

Cross examined, the witness said that Sam Lindley reached the porch about the time that witness heard the disturbance in the clerk's office. He did not see Pingenot on his (Pingenot's) way to the window, but saw him returning from it. The noise which attracted witness's attention sounded like chairs falling in the clerk's office. When that noise was made, Pingenot was nearer the window than the witness was. One of the blinds of that window was open and the other was partially open, the one nearest the porch being the open one. That window was about eighteen inches distant from the edge of the porch, and the sash was up.

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Witness was about fourteen or fifteen feet distant when he heard deceased say: "Please don't kill me." Judge Kempf was some eight or nine feet off. Witness left the window in order to get out of the way of any danger that might arise. Not more than ten or twelve seconds intervened between the first and second shots. The sound of Hildebrandt's second shot blended with that of the shot fired from the inside, but witness could tell that two shots were fired. The shot from the inside anticipated Hildebrandt's second shot by a fraction of time. Witness testified on the habeas corpus trial of the defendant, and recognized the writing now exhibited to him as his testimony on that trial. That writing contains the following statement: "Hildebrandt could have gone to the east end of the porch before the first shot was fired, if he had slipped out. I mean, by slipped out, if he had gone out so I could not have heard him." By that statement witness meant to convey the idea that Hildebrandt could not have gone out without witness hearing him, unless he had gone out on his tip toes. Witness did not think there was time for him to have tip toed to the east end of the porch between the time he, witness, left the window and when he saw Hildebrandt rush out of the hall and turn and fire. Hildebrandt did not go to the window when he came from the hall to the porch, but when he reached the porch he turned and fired down the hall. There is no mistake about that fact. Witness knew Andrew Schuele, and may, on the day of the homicide, have spoken to him about it in front of the assessor's office, but he had no recollection of so doing. If so, he did not tell Schuele that he saw nothing of what happened inside of the court house, and only saw Hildebrandt shoot twice from the gallery. Witness and defendant were not on friendly terms.

L. G. Denman testified, for the State, that he was an attorney at law. Deceased was an attorney at law, but was not a member of witness's law firm, but owned a half interest in an abstract of land titles of which witness's firm owned the other half. Deceased moved to San Antonio from Medina county about two years before he was killed. About that time the defendant called at the office of witness's firm in San Antonio to see the deceased. From their conversation and actions on that occasion, witness took them to be friends, and understood from their interview that the deceased had transacted business for the defendant. Hildebrandt introduced the defendant and witness on that occasion. At the term of the Medina county district court suc-

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ceeding defendant's visit to witness's office, witness saw the defendant and deceased meet on the streets of Castroville without speaking. Witness had often seen them meet without speaking since that time, one of those times being upon the trial of a case in the justice's court in San Antonio, in which case both of them were interested. They were, at the time of Hildebrandt's death, and for some time previous had been, bitter enemies. Deceased arrived in Castroville about ten o'clock on the morning of the fatal day, for the purpose of trying the case of Volmar v. Ihnken, which was set for that day, deceased being the attorney for Volmar. After some preliminary work and consultation among the attorneys, the case was continued, and deceased went down stairs. At that time witness was seated at a table up stairs with Judge Paschal and Mr. Slaton, preparing some bills of exception. He heard a noise down stairs, and some one said it was from a row which was in progress below. At first witness paid no attention to the matter, but when he heard pistol shots he got up and started towards the up stairs porch. Somebody remarked that defendant and deceased were the combatants, and witness went down stairs, and found defendant standing in the hall between the porch door and the clerk's office, looking towards the porch, on which Hildebrandt was then lying and groaning. Witness asked defendant who shot Hildebrandt. He replied "I did. He shot at me first, and I killed him." Defendant was then standing still, and was calm and self possessed, but pale. Witness then went to the porch and sent for a physician. Doctor Frisoni was then there, but witness did not then know that he was a physician.

A short time after this the witness saw the defendant standing in the court house yard, a few yards in front of the porch, talking to some of his friends. This was about thirty minutes after the shooting. Defendant would weigh about two hundred and twenty-five pounds, and was a strong, well made man. Deceased weighed about one hundred and thirty or thirty-five pounds, was about six feet tall, lean and emaciated, in bad health, and at that time was taking medicine for a throat affection. His left arm was so crippled that it was smaller than his right, and serviceable to him only in drawing things to him. Defendant was very bloody when witness met him in the hall, and had another substance besides blood on his coat and vest which looked like mucilage. Hildebrandt died about noon on the day of the shooting. His body was removed to the office of Mr. Thompson, in

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the front part of the jail, which was the rear portion of the court house.

At about ten o'clock on that night, when the undertaker began to embalm the body, the defendant walked up to within ten or fifteen steps of the body, and for a short while watched the process of embalming. He was not then under arrest, was the sheriff of Medina county, and, no doubt, had a right to go to that place. After the body was placed in the coffin, witness looked at it and called the attention of the undertaker and Mr. Metcalfe to a slight wound over the left eye, his reason for doing so being that the report of the physicians did not mention that wound. After the shooting was over, the witness saw blood under the table in the clerk's office, opposite the vault. He also found the deceased's cravat in the clerk's office. He found one of the record books open on the desk in the left hand corner of the clerk's office, and near it, on either side, were some of the deceased's papers and an unfinished memorandum in his handwriting. There was blood on the record book. Court had not adjourned when the shooting took place, but the judge was at the table with witness and not on the bench. Witness could not say that there was any business at that time before the court which required the presence in the court room of the sheriff.

Celeste Pingnot, treasurer of Medina county, testified, for the State, that a few minutes after eleven o'clock on the morning of the fatal day, he closed his office and went to the porch of the court house, where he met Nestor and Hornung. Sam Lindley soon came up. After concluding a short business talk with Nestor, the witness heard a noise issuing from the clerk's office, which sounded like the falling of chairs, desks or books. The witness, who was the person on the porch nearest the east window of the clerk's office, stepped to that window and looked in. He saw Hildebrandt sitting in a chair and defendant facing him. Defendant's left hand and deceased's right hand were struggling, the one against the other, and deceased's left hand was raised as if to protect his face or head from a blow, while defendant's right hand, clasping what witness thought was a beer glass, but proved to be a bottle of mucilage, was raised in a striking attitude. Defendant struck the deceased two blows with the bottle, shattering it, and about that time the witness, having no desire to be summoned as a witness to this transaction should criminal proceedings ensue, left the window and attempted to get off unobserved. Recrossing the porch, the witness

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met Lindley and Hornung, who appeared to be going either to the window witness had just quitted, or in at the hall door. Witness made no halt, and did not know where Hornung and Lindley went. Witness had gotten about fifteen steps away from the porch when he turned his head and saw deceased run out of the hall door, make one step on the porch, and wheel with his pistol in both hands and fire one shot down the hall. That shot was followed by two others, the reports of which were blended. The shot from the hall was fired a fraction of time before Hildebrandt's second shot was fired. Witness then saw deceased begin to fall, and crossed the street to a bar room.

On his cross examination the witness said that when he saw the deceased rush out of the hall, just before he fired his first shot, there was no other person within the range of his vision. He did not see either Hornung or Lindley on the porch at that time, but he was looking only at the deceased. A person might, without being seen by witness, have been on the outer edge of the porch, or on the outer corner of the same. Witness had made perhaps twenty-five steps from the window when he turned and saw deceased rush out of the hall door. If Hornung was on the porch at that time witness did not see him. A person in the county clerk's office could not see a man who, having left that office, had turned to the left in the hall, because of the intervening wall. A person standing in the door of the clerk's office could not see a man who, having gone from the hall to the porch, turned to the left, because of the intervening wall. A person standing at the left side of the clerk's office door, going in, could not see a man seated at the desk in the southeast corner of the office, because of the vault which intervened. He might see a man seated at that desk if he looked from the right hand side of the door going in, but witness doubted if he could. He thought a person would have to enter the clerk's office before he could see a man at the desk where he saw defendant and deceased from the east window. The sash and glass of the window through which he looked, he thought, were down. One of the blinds was open. The other may or may not have been closed. The witness neither saw nor heard Lindley pass over the porch after he (witness) left it.

August Kempf, clerk of the district and county court of Medina county, was next introduced by the State. He produced the suit of clothes which were worn by the deceased at the time of his death, a mucilage bottle, a little more than half filled with

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mucilage, the fragments of a mucilage bottle, a forty-five calibre revolving pistol, which was taken from the porch near the body of the deceased, four forty-five calibre cartridges, a small vulcanized pistol scabbard, and some cuff and collar buttons, which, he testified, were the articles used in evidence on the habeas corpus trial of the defendant, and afterwards placed in his official custody. The bottle, a little more than half filled with mucilage would hold about a quart of that substance, and weighed about one and a half pounds.

Cross examined, the witness stated that between three and five minutes before the shooting he went from the district court room to the clerk's office. Passing the open door of the sheriff's office en route, he saw the back of a man sitting at the sheriff's table, in that office. Apparently the man was engaged in writing, but witness was not able to say that that man was the defendant. Court was in session at the time of the shooting, but the judge was not on the bench. He was at a table near the stand, with some lawyers who were preparing some bills of exceptions. Previous to the shooting the defendant was up stairs in discharge of his official duties. Two chambers of the pistol produced by the witness were empty, and four were loaded.

J. W. Hildebrandt, father of deceased, said that his son was a weakly child from the first, was never a strong, robust man. He was five feet eleven inches high and weighed from one hundred and thirty-five to one hundred and forty pounds. Was crippled in left arm, had had the elbow cap knocked off in a fight in 1883. He could use the arm to push with, but not to pull with.

The State rested.

James A. Slaton was the first witness for the defense. He testified that he was a lawyer and lived at Castroville. He was in the district court room at the time of the shooting. Court was then in session, but in recess, and witness was engaged with Judge Paschal in the preparation of a bill of exception. A row down stairs attracted some attention and remark, but witness did not go down until after the shooting took place. He and Judge Paschal then went down together. When witness reached the foot of the steps in the hall, he observed Mr. Denman a few steps in advance of him, and heard him ask the defendant, then standing in the hall: "Who did that?" Defendant replied: "I shot him; he shot at me twice." Denman went to the porch, and witness went with defendant into the office. When in his office defendant told witness that he had written an official letter to

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Attorney General Hogg, and went into the clerk's office to get August Kempf to endorse it; but that August was not in. Defendant showed that letter to witness and he read it. The letter now shown the witness looked like the same, and its contents were about the same.

Cross examined, the witness said that he could identify the letter in evidence as the letter shown him by defendant only by the contents. Mr. Denman was in the court room a few moments before the shots were fired, but witness did not remember seeing him just at that time. Witness was not of counsel for defendant in this case, nor did he represent him on the habeas corpus or inquest trials. He did, however, ask some questions of witnesses on the inquest, and when the bail was fixed by the magistrate, he pronounced it exorbitant. Witness was a friend of the defendant and had acted as his attorney in other cases. At this point the defense put in evidence the letter referred to by the witness. It reads as follows:

"CASTROVILLE, TEXAS, June 22, 1887.

"Hon. James S. Hogg, Attorney General, Austin, Texas:

"DEAR SIR: Will you have the kindness to give me your valuable opinion on the following point: When a sheriff conveys an attached witness out of his county before a district judge, on a habeas corpus hearing, and the witness is too poor to give bond, and unable to pay his expenses out of his county, is the sheriff entitled to actual expenses for conveying such an attached witness out of his county?

"Your opinion will ever oblige

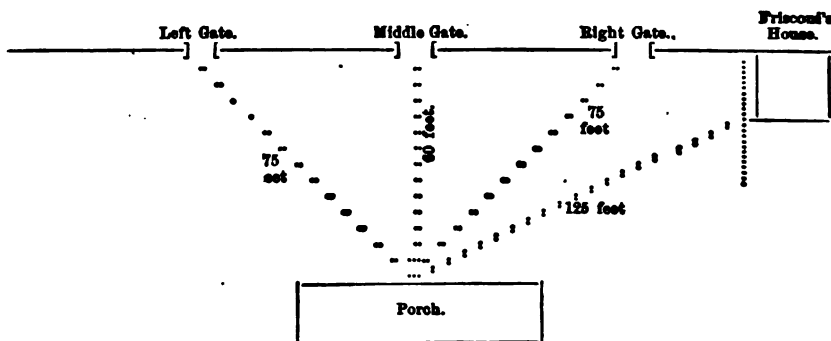
"Your obedient ser't,

"F. THUMM."

Doctor Otto Frisoni, testifying for the defense, described the wounds on the person of the deceased substantially as they were described by Doctor Boll, and declared that the cause of death was the gunshot wound in the head, and that the contusions on the head did not in the least degree contribute to the fatal result. After describing the incised wound on the interior artery in the region of the temple, the witness said that the blood ejected from that wound would not fall at a greater distance from the feet of the wounded party than about two feet, and it would not fall in a straight line if the party were moving in a straight line himself, but, on account of the motion of the body, would fall

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in a zigzag line after the fashion of a diagram made by the witness, which resembled a serpentine fence. The artery wound was not a serious one. Witness was standing on the gallery of his own house, one hundred and twenty-five feet distant from the court house, and saw the shooting of the deceased, having at the time an unobstructed view of the court house porch. Deceased came out of the court house hall door and went diagonally to the left, to a point near the window of the clerk's office. Witness saw him going from the window. August Hornung, at the time the fatal shot was fired, was on the ground, walking fast, and was about half way between the porch and either the front or the left hand gate of the court house yard. The location of the court house porch, fence, gates, and Frisoni's house is shown as follows:



Celeste Pingnot, at the same time was about half way between the porch and the front gate, going from the porch in a rapid walk.

On his cross examination the witness testified that he had been attending court since the day it convened. Part of his business was to exert what influence he had in behalf of the defendant, but he had other business at the court house. Witness did not consider the temple wound on the deceased a dangerous one, because it could have been instantly controlled by either of four different treatments. It was possible, the witness thought, but not probable, that if no attention had been paid to the temple wound, the deceased could have bled to death from it. Witness was examined on the habeas corpus trial of defendant. His written testimony as here exhibited represents him as testifying on that trial that had the temple wound been the only one inflicted

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on deceased, and had no attention been paid to it, the chances of death by bleeding preponderated against the chances of recovery. No question, such as is implied by this statement, is asked witness, nor is it the one now answered by him. The question which called forth that answer was: "If a man out on a prairie should receive such a wound, and be without assistance, what would his chance of living be?" To that question the witness made the reply quoted, and would make it again. Witness, however, did not think that, had the temple wound been Mr. Hildebrandt's only wound, that he would have died, because he could have staunched the flow of blood himself.

W. N. Parks was the next witness for the defense. He testified, in substance, that he was county attorney of Medina county, and knew Joseph Kempf, who testified as a witness for the State on this trial. Witness, in the discharge of what he conceived to be his duty, went to the court house a few minutes after the homicide, and made a careful examination of the ground upon which the killing occurred. Hearing that Mr. Joseph Kempf was in the clerk's office when the difficulty began, the witness went to him, in his office, on the fatal day, and, among other things, Mr. Kempf told him that when the defendant came into the office he started to the vault, and then asked him where August Kempf was; that he replied that he did not know, and that defendant then went to where deceased was sitting and said to him: "Are you hunting up some more indictments against me?" That Hildebrandt then jumped up and defendant seized the mucilage bottle and struck Hildebrandt over the head with it. The witness did not communicate these facts to either the defendant or his attorneys until the Friday before this trial.

The porch of the court house was about eight feet wide and about twenty-two feet long. The blood lines on the porch extended from the hall door diagonally to the left and to the edge of the porch. These lines were not straight, but were irregular or zigzag. There was some blood on the ground below the edge of the porch. The blood line extended also along the hall from the clerk's door to the porch, and was straight but somewhat irregular. Witness's attention was called to what was said to be blood under the table in the clerk's office opposite the vault, and he examined it particularly, finding it to be mucilage and not blood. Witness also examined the blood stain on the door facing. It was on the middle facing—not the inside nor the outside facing—and was put there by rubbing, and did not get there by

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flowing from the wound from which it came. He also examined the blood on the hall door that was shut. That on the inside of the said door was over three feet from the hall floor. That on the outside was two feet and nine inches from the porch floor. The porch floor was about two feet and nine inches from the ground. The window looking into the clerk's office from near the edge of the porch commences about four and a half feet from the ground. The bullet hole in the wall outside the hall door was about nine inches from the hall door on the left side going out; the bullet hole inside the hall, in the rear wall, was about thirteen inches from the right hand door facing. The rear hall door was about three and a half feet wide, and the hall itself about three feet wide.

On his cross examination, the witness said that he was a friend to the defendant, but had taken no other part in the defense than to testify to facts which came to his knowledge. He was aware of the facts to which he has testified at the time of the defendant's habeas corpus trial, but did not communicate them to the prosecution because the district attorney, Mr. Powell, and Mr. Denman and Colonel Green, the special prosecuting counsel, in taking charge of the case, ignored witness entirely, and did not advise with nor consult him. Feeling that he had not been treated with the courtesy due him in the matter, he kept his information to himself; and, for the same reason, when August Hornung testified on the habeas corpus trial that the discoloration on the floor beneath the table in the clerk's office was blood stain, he did not take the stand and disclose that the said discoloration was mucilage, and not blood stain. Moreover, the blood stains and impeaching evidence were defensive facts, and could not benefit the prosecution. Witness heard Mr. Denman telephone to the district attorney, and he, witness, then telephoned the district attorney that he need not come, as he, witness, could attend to the case, and he could have done so. The district attorney, however, did come, and he and Mr. Denman proceeded with the case, independent of the witness.

A. Bodeman, sheriff of Kendall county, testified, for the defense, that he was familiar with fire arms. The Hildebrandt pistol being placed in the hands of the witness, he testified as follows: "This is a forty-five calibre pistol. It is of single action, and will not cock and discharge itself by a pull on the trigger. It has to be cocked by hand manipulation."

Doctor Henkell testified, as an expert, for the defense, that he

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had listened to the evidence in this case, and was of opinion: "1. That the pistol shot wound was the sole cause of Hildebrandt's death, the other wounds not contributing in the least degree to the fatal result. 2. The temple wound would not probably have caused death, even without surgical attention. If an artery bleeds constantly it does not bleed regularly, that is, it ejects blood irregularly immediately after the heart throb. The blood is forced out strongly and the jet reaches furthest; the flow then decreases until the next pulsation, and so it continues. The blood line from an artery, if the wounded party should walk straight and steadily, would be a zigzag line. The anterior temple artery (which was the one incised in this case), was classed as a small artery, and it would eject blood from the feet of a person standing erect not more than twenty-four inches. I am of opinion that the blood ejected from Hildebrandt's lacerated wound could at no time, if he stood erect, have fallen a greater distance from his feet than eighteen or twenty-four inches."

Andreas Schuele testified, for the defense, that, between two and three o'clock p. m., on the day of the tragedy, he met August Hornung in front of his, Hornung's office, and asked him how the trouble occurred. Hornung told witness in reply, that he did not see what occurred in the court house; that defendant and deceased must have had some trouble in the clerk's office; that he only saw Hildebrandt on the outside, holding his pistol in both hands, and saw him shoot from the outside into the hall, and that he shot twice. On his cross examination, the witness said that he told no one about Hornung's statement to him, until he saw Hornung's testimony on the habeas corpus trial as it was published in the San Antonio Daily Express; when he told Judge Thompson, the attorney for the defendant.

Nic Tshirhart testified, for the defense, that he was the jailer of Medina county, Texas, and had charge of the jail on the morning of June 22, 1887. Feeling unwell on that morning, he went to the sheriff's office to get permission to go off duty. He found the defendant in his office, engaged in writing at his table. Witness left at once for his home, which was about two hundred and fifty yards distant. He walked in his usual gait, consuming from three to five minutes getting home. He had just reached his house when he heard the reports of the pistol. He ran back to the court house at once, and found de-

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ceased stretched on the porch, with Doctor Frisoni attending him.

William Schweer testified, for the defense, that he knew the State's witness Joseph Kempf. Between eight and nine o'clock on the morning of June 27, 1887, the day on which the grand jury reassembled, witness met Joseph Kempf on the steps of the court house portico, and asked him about the fight between Thumm and Hildebrandt. Kempf replied: "I was sitting at my desk in my office when Thumm came in and asked me where August was. I told him I did not know. Hildebrandt was then sitting at the other desk and Thumm went to him, and they talked together. Then, while they were talking, Hildebrandt jumped up, and then Thumm hit Hildebrandt, and Hildebrandt went out of the door of the office into the hall, and then to the porch, and then towards the window of the clerk's office nearest the porch, and I believe wanted to shoot through the window; and then Thumm stepped out of the clerk's office into the hall, and then Hildebrandt shot into the hall." Kempf then showed witness the holes made by the bullets, one being in the wall near the front hallway door on the outside, and the other near the rear hallway door on the inside. He also showed the witness the way Hildebrandt went on the porch towards the window, stating that he believed Hildebrandt wanted to shoot through the window, and that Hildebrandt then turned and went back to the porch and shot into the hall. On his cross examination the witness stated that he did not report the facts to which he has testified, to Thumm or his attorneys, until after the habeas corpus trial, when he saw Kempf's testimony printed in a newspaper; when he reported it to his friend, Thumm.

The defense closed.

Messrs E. Digges, S. B. Easley, E. DeMontel and John Redus, testifying for the State, in rebuttal, said that they had never heard the reputation of Joseph Kempf for truth and veracity discussed, but knew it to be good. Redus and DeMontel testified also that the reputation of August Hornung for truth and veracity was good, although they had never heard his reputation discussed except when he was running for office.

The motion for new trial raised the questions discussed in the opinion.

Walton, Hill & Walton, for the appellant: It is claimed by appellant, and we think the testimony demonstrates it to be the fact,

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that there were two difficulties, a first and second—the first commenced by appellant, but definitely ended—deceased reached a place of absolute and unquestioned safety, appellant having voluntarily, for a measured and measurable space of time, abandoned all violence and withdrawn from the difficulty; that then, deceased being in a place of safety, unpursued, out of sight of appellant, voluntarily returned to the presence of appellant and, moved by his own will alone, commenced an independent fight with deadly weapons when none had before been used, and, indeed, no effort made to use any. .

The court under these facts refused to charge either self defense or manslaughter to the jury as the law of the case, but confined the finding to one of the degrees of murder.

We have not the benefit of the transcript and must rely on memory for the facts. Referring to the statement of facts, we state what we conceive to be the effect of the testimony as it came from the witnesses as they severally testified.*

There was but one witness present in the room at the first difficulty; three others, however, obtained, as they swear, a glimpse of part of the difficulty. There is considerable and irreconcilable conflict in the evidence, one line of which, taken as true, makes out the claim of appellant, plainly and irrefutably; while the other line, taken as true, weakens but does not destroy the claim.

Joseph Kempf, an old gentleman sixty-five years old, who bears a good character, was the witness in the room. It is true some witnesses swore to some contradictory statements made by him (of an important character), but the contradictions weighed nothing, one way or another, for the reason that the jury was not charged any law that called for their consideration by the jury. This witness was very hostile to appellant; but we believe he testified to what he thought was true, and to what he saw, as he remembered it.

•We claim that if there had been no other testimony in the case but that of the witness, appellant, under the law, was entitled to a charge on both manslaughter and self defense. But this was not all the testimony.

Doctor Boll, Doctor Frisoni and Doctor Henckell establish material facts which it will not do to overlook:

The brief summarizes the testimony correctly as it appears in the record, but in reproducing the brief, the summary is omitted.—REPORTERS.

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1. The gunshot wound was absolutely mortal.
2. It paralyzed the whole system instantly, both physical and mental.
3. The wounds received in the clerk's office did not contribute to the death to any extent.
4. Doctor Frisoni shows that the deceased went out on the portico, out of sight of appellant, and was coming from the window from which a view could be seen into the clerk's office where the original difficulty occurred, and in which he had left appellant when he came out. It shows further that the deceased was coming from the window where the blood lines in the diagram show uncontestibly he had been. There was a stone wall two feet thick between him and appellant, and he was then absolutely in safety, no one in pursuit, he having it in his power to go forward and thus continue to be in safety, or to return and come into danger, or rather to turn on his tracks and, not renew, but open up a new and independent fight with deadly weapons with appellant.

The witness Pingnot flatly contradicts Joseph Kempf in one particular, and explains another which Mr. Kempf did not see, or if he did see did not remember, or if remembered, did not tell, although directly questioned.

1. That when Thumm was striking Hildebrandt they were fronting one another, and all the blows were not delivered from the rear of deceased.
2. The right hand of Hildebrandt and the left of appellant were locked.

These facts in themselves show a conflict—no matter the merits—there was a conflict and a contest, if this witness speaks truth. He was not attacked either in general character nor by contradictory statements. Hildebrandt was armed—this is not and will not be denied. What is more natural than to infer that, when appellant struck deceased with his fist, deceased reached for his pistol and the hand was grasped and held to prevent him from reaching it. We are not seeking to justify or excuse appellant for his original assault on Hildebrandt,—not at all. The assault was wrong in law, no matter what the object, purpose or intention of appellant was in making it—whether to provoke a contest and in it to kill, or in it to do some serious bodily harm, or merely to commit a simple and ordinary battery because of some real or fancied wrong done him by deceased. That is not the question; Hildebrandt was not struck wholly from behind, and there was a contest—a conflict between the parties. This shows that wit-

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nesses, however honest, may not see all that occurs; and further, may think, and this honestly, that they saw something that did not occur, and which has no existence and never had; and it further shows the wisdom of the law that requires conflicting facts, when one view of them tends to ameliorate the degree of crime charged, shall be submitted to the jury under appropriate utterances of what the law is when applied to them—and this, too, no matter how impotent the testimony to prove an abstract or independent fact, when unconnected with the surrounding criminating facts and circumstances. The whole evidence should go to the jury that tends to elucidate a fact, and no phase of testimony should be let in that is not guided by appropriate charge of its law. A very little thing oftentimes operates as a key to unlock most abstruse and complicated mysteries, and gives the right path that leads through labyrinths of confusion.

The witness Hornung was contradicted by the witness Schuele, who said that at two or three o'clock on the day of the shooting he asked Hornung how the difficulty came about, and received reply: "I only saw Hildebrandt shoot twice. They must have had some trouble in the clerk's office"—or words to that effect.

The witness Lindley corroborates in one material respect that of Joseph Kempf in what occurred at the table. Kempf says Hildebrandt stumbled at this table and "sorter fell"—did not fall—caught on the table and recovered himself. This is evidently the movement seen by Lindley. Being from different standpoints, they were seen to an extent in a different light by the two. Hornung stands alone as to words and a blow at the table. The thing is so improbable, under the surroundings, that, in the light of what others saw, it is simply incredible.

Judge Denman's testimony establishes six facts: 1. That appellant and deceased were friends eighteen months or two years before the homicide. 2. About that time there was a rupture between them, and since then they had been enemies. 3. He was on the ground in a few minutes, and after the shooting he saw appellant between the clerk's door and the hall. He was pale, but did not appear excited. 4. Asked appellant: "Who did that?" (meaning, who shot deceased), and received reply: "I had to do it; he shot at me first." 5. Afterward, and before deceased died (he lived thirty or forty minutes after being shot), he saw appellant standing in the yard, some ten or twelve steps from the portico in the court house yard. He was then in company with P. B. Galbreath, a deputy sheriff. He appeared natu-

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ral. 6. He again saw appellant, about nine o'clock at night, come within ten steps of where the body of deceased (at the jail) was being embalmed. He stood a moment or two and left; did not appear excited. The sixth fact proven by this witness was objected to on the ground that the time was too remote to give index to the intent moving to the killing—was therefore immaterial, and calculated from its very nature to prejudice the minds of jurors against defendant. We call attention to the bill reserving the point. We feel that this was hurtful evidence against our client, although it threw no ray of light on the killing.

With the testimony of Mr. Hildebrandt, the father of the deceased, the State closed its case.

The defense showed by the testimony of Mr. Slaton: 1. That the object of the defendant in going into the clerk's office was a legitimate one. 2. That he was not in pursuit of deceased.

Tshirhart's testimony identifies who it was August Kempf saw in the sheriff's office when he passed the door, a short time before the shooting. It also establishes the fact that appellant was quietly engaged in writing a little while before the first encounter in the clerk's office.

Doctor Frisoni's testimony shows that the witnesses Pingent and Lindley were not in position to see what occurred on the portico, unless they had eyes in the back of their heads, while their own testimony shows they had little, if any, inclination to see what occurred.

The witness Schweers's testimony was a direct contradiction of the State witness Joseph Kempf. Schweers stands as well as any man in Medina county, had no interest in the case, and was no relation to the parties. He is to be believed; as much so as Joseph Kempf. This evidence going to the jury, and the law of the case charged, would have an appreciable effect. It indirectly corroborates Doctor Frisoni, and puts new life into the blood that led from the hall door to the edge of the porch, near the window. Joseph Kempf sat at a place where, if he had looked, he could have seen the movements of Hildebrandt on the portico. Did he look and see? Did he tell the witness what he saw, and then forget? This witness is corroborated, to an extent, by the next one.

Mr. Parks, the county attorney of Medina county, gave most of the data on which the main diagram is based. He was clear and full on these points. His testimony establishes three important facts: 1. There was no blood under the table. This fact

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breaks into the evidence of Hornung and Lindley. If deceased was knocked under the table, blood would be there as a necessity; the artery was bleeding, and blood fell under the table if he was under it, for any length of time. So as to Lindley. If deceased was getting up at that table, there would have been pools of blood, or a pool of blood. There was no blood under the table; there was no pool or pools of blood about the table. So the facts fit back on the testimony of Joseph Kempf, that, after the last blow with the fragments of the bottle was delivered at the table, appellant was quiescent, and did not again molest deceased, by act or word, until after he was shot at by deceased, when he, deceased, had reached a place of absolute safety, and voluntarily returned from it to the presence of appellant, and opened an independent fight with deadly weapons, resort to which had not before been had.

2. That deceased went out on the portico to a place of safety, and was in entire safety from appellant, who yet stood at the door. The blood lines on the portico have an inaudible voice, but the fact they silently manifest is beyond dispute; they mark the going from the hall door to the left hand edge of the portico, from where deceased could see through the window into the clerk's office, where he had left appellant. They mark the return of deceased to the hall door, where he opened fire on appellant. They will not down—they can not be silenced—they can not be explained in any other way than that they were made by deceased as he went and returned. They were not sought to be explained—the task was hopeless. They are there, and could have been made in but one way, and that way was the one stated. The blood fell there and made the lines there as deceased went from and returned to the hall door. There is the line that marked the going—there the bloody drops on the ground as he stopped and looked, and there the blood lines that mark his return.

3. The witness Joseph Kempf saw and heard more than he remembered. It is hard to believe that the county attorney would falsify; equally hard to believe the witness Schweers would do so, and hardly to be believed the witness Kempf would willfully do so. It is to be explained only on the hypothesis that the old gentleman saw, heard and forgot, but told to these witnesses what he saw and heard before he forgot. We think that it may be safely taken to be true that *something* did occur in the clerk's office between appellant and deceased of an angry nature before blows were resorted to. The sheriff of Kendall county

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proved that the pistol used by Hildebrandt was a single action pistol; that is, it would not cock and then descend on the cartridge by pulling on the trigger, but the hammer had to be raised by hand and then the trigger pulled, to throw the hammer on the cartridge to explode the charge.

This evidence shows that after deceased fired the first shot he had to manipulate the hammer with his hand, to cock the pistol, to prepare for the second shot. Thus it is seen that deceased was not greatly stunned or dazed by the blow; and, further, that he knew very well what he was doing, and that his purpose was deadly: 1, he left the presence of appellant; 2, he gained safety; 3, he returned and opened a new fight; 4, he drew his pistol after he left appellant; 5, he reflected, considered and calculated; 6, he went to the window and looked into the clerk's office; 7, the appellant was not visible from that point, but was at the door; 8, deceased cocked his pistol and returned to the hall door, and, seeing appellant, presented his pistol with both hands and fired; 9, he recovered his pistol and re-cocked it, and again presented and fired. These facts can not be gainsaid, and they cut an important figure in this case.

Such is the case on the testimony. The question is: Did the court charge to the jury the law applicable to the facts? Of course no long argument nor intricate or learned discussion is needful here. Original reason of the common sense mind can answer the question in a jurisdiction where trial by jury to determine facts is a constitutional and statutory right. In such cases it is not the province of the court who presides to utter the law alone—to assume the existence or non-existence of facts where there is testimony that tends to establish a condition of things contrary to the assumption of the court. We use the word assumption in no offensive sense—directly or indirectly—but mean to say that where the court charges the jury to find only within given degrees of crime (if they find guilt at all), is an assumption by the court that facts are absent which would, if present and considered, justify a lower grade of crime than charged by the court.

We take it that, in view of the testimony in this case, there are two propositions of law that would have decreased the degree of crime found that were not given in charge, and that under the rule of common sense and the decisions of this court, they should have been given. The failure of the court to give them was an assumption on the part of the court that there was

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no evidence tending to show—no matter how impotent it might be—that the ameliorating facts were not in evidence. That was a high assumption—an assumption that any frail man—(and all men are frail), should and ought to tremble to assume when the life or liberty of a citizen is concerned.

1. The law of manslaughter should have been given. It was not given, though asked by appellant at the trial. The attention of the court was directly called to the subject matter, and the query as to facts was asked to be put to the jury in a special instruction, which was refused.

The evidence on the trial was: 1. The parties were enemies. 2. A casual meeting occurred. 3. Appellant assaulted deceased with his fist when he (appellant), was armed, and could have used deadly weapons. Conceding for the moment and for the sake of the argument that the killing took place at a subsequent stage of this same difficulty—that there was no ending of it—but an actual, visible, indisputable continuation of it, until the fatal shot was fired—what then was the law of the case?

It will not be questioned that if the first blow had been with an instrument that would likely produce death, or certainly do serious bodily harm, then, other blows, or shots following, and death ensuing from the subsequent blows or shots (or the fist either), the killing would have been murder in the first or second degree; but if the difficulty was brought about for the sole purpose of administering an ordinary or simple battery, then, an emergency arising, the party making the assault being put in extremity and forced to kill to save his own life, the killing would be manslaughter only. Such we understand to be the rule of law, founded in reason, and upheld by the decisions of this court.

Permit us to restate the proposition: If a difficulty be provoked for the purpose of administering a simple or ordinary battery, and during the continuance of the conflict the party making the assault is put in extremity and kills to save his life, he can not put up self defense and justify himself, yet the killing will be manslaughter.

The material question on this branch of the case is, with what intention did appellant strike the first blow? 1. Was it to provoke and kill? 2. Was it to provoke and do great bodily harm? 3. Was it to provoke and commit an ordinary battery? This was question of fact on which the jury had to pass. It was a fact outside of the province of the court to affirm or deny! It was

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not submitted to the jury. It was decided by the court, in that he refused to submit it to the jury, and in effect decided that the intention which accompanied the blow with the fist was the first or second of the above designs. (Howard v. The State, 23 Texas Ct. App., 279, and authorities cited; Hobbs v. The State, 16 Texas Ct. App., 517, and authorities cited; Niland v. The State, 19 Texas Ct. App., 166; McLaughlin v. The State, 10 Texas Ct. App., 340; Green v. The State, 12 Texas Ct. App., 449; Neyland v. The State, 13 Texas Ct. App., 550; Reynolds's Case, 14 Texas Ct. App., 435; Moore's Case, 15 Texas Ct. App., 1; Rutherford's Case, 16 Texas Ct. App., 649; Jones's Case, 17 Texas Ct. App., 603.) Other cases might be added, but these suffice; the last case is exactly in point. It is no longer an open question in this State.

1. If difficulty be provoked to commit simple battery, and extremity ensue in *that* difficulty, and death be inflicted by the party making the assault, to save his life, the offense is manslaughter.

2. If the assault be made under circumstances, or with such a weapon, as to leave in doubt the intention of the party making the assault, such doubt must go to the jury to solve, under appropriate charges of the court.

3. If there be any testimony which tends to establish manslaughter or self defense—no matter how impotent it may be—the court must charge the law of the case. The court has naught to do with the facts; to pass on them is the exclusive province of the jury.

I. The testimony in this case establishes: 1. The assault was made with the fist alone. If the blow made any perceptible mark, no witness testified to the fact. 2. Appellant was armed with a six shooter, and could have used it to shoot deceased, or as a bludgeon with which to beat him. He did neither, but used his fist. Such being the case, is there not a doubt about what appellant intended to accomplish or perform when he struck, which the jury alone was competent to solve; and does not the doubt involve, on the one hand manslaughter, and on the other a higher degree of crime? 3. The witness Pingenot swears that the left hand of appellant and the right hand of deceased were locked. What did that mean? What reasonable inference is to be drawn? Deceased was armed; what more natural than that the blow maddened and angered him, and he tried to draw and use his pistol; the right hand was caught, and in the then excitement and hot blood aroused, the mucilage bottle was brought

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into play. 4. The original blow was with the naked fist, and some motive prompted the blow, and it was given for an object and a purpose, which object or purpose was matter for consideration of the jury, and not for the decision of the court. The court decided this vital question of fact, and to that extent deprived appellant of the right of trial by jury.

II. The court also failed to give the law of self defense. The law is that where a party provokes a difficulty—no matter the degree of injury that results, whether only an ordinary battery, serious bodily injury, lopping a limb or deprivation of life—there is no self defense, provided the injury be inflicted during that difficulty. But, if that difficulty shall commence, progress and end, and the party assaulted, after the ending, shall in turn become the assailant, then the party who made the assault in the first instance is by law reinvested with his right of self defense, and he may defend the same as if he had never been a wrong doer. The law of self defense was not given by the court, and when asked by appellant, was refused. That the rule we have laid down is the law in this State, we refer to *White v. The State*, 23 Texas Court of Appeals, 162, with authorities there cited. This case ought to have been cited on the last proposition, to show that the law presumes an intent and purpose moving every violent blow, and, further, that such intent and purpose, being matter of fact, must go by law, and under the law, for solution to that legal body which, under and by the law, has the right to decide the fact, and therefore determine the intent and purpose of the blow.

Referring to the case of *Stoffer*, as reported in self defense cases by *Horrigan & Thompson*, and as approved by this court, we have only to say that the law is that if A make an assault, no matter what his design, purpose or intent, he thereby forfeits his then right of self defense; but if he abandon the assault voluntarily, and, so far as he can, withdraw from it, and pursue it no further, then, if the party he assaulted, after A has ceased violence and ceased to pursue or strike blows, or try so to do, begin a new assault on his own account—then A is reinvested with self defense, and he may stand on it and there live or die. Is this the law?

If yes, then let us see what the facts are: 1. It is true that the difficulty occurred at the desk in the southeast corner of the clerk's office. 2. It had a commencement blow with the fist; it had a progress, blows with the mucilage bottle; it had an ending,

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the assaulting party, of his own notion, voluntarily ceased to do violence when it was in his power to have continued; no one interfered. This is the evidence of one witness, of whose good character counsel on the other side said the angels in heaven were unhappy because they could not come down and be sworn and speak in his behalf. (About this, however, the writer has his doubts, and they are quite reasonable, too, he thinks.) True, another witness says there was a blow at the middle table, but, grant that what Hornung said is not a patent lie, then he and Joseph Kempf cross one another as to the fact, and the jury should judge.

3. Unmolested, undisturbed, unspoken to, unstricken, the deceased moved from the table through the room, out at the door, into the hall, out at the door on to the portico, some six or eight feet behind a two foot wall, into a place of perfect, absolute safety, and then, after time for reflection, to calculate, to determine, he turned on his track and went again into the presence of his late assailant, and voluntarily commenced a new and independent conflict with deadly weapons, and in the fight that ensued he lost his life.

It will not be denied—it can not be truthfully denied—that there is testimony to stamp as true every word of the case as stated. There is some evidence of a contradictory character, but who is to decide which witness told the the truth? Not the judge—God forbid such a travesty on right, justice and law. Suppose, however, we confess that it is true that Joseph Kempf swore falsely, and that Hornung is the artless truth teller, then we have the violence ended by voluntary cessation at the table, and naught else occurring until after reflection by deceased, and his determined, murderous shot was fired in vengeance, and not in self defense. Is the case not fairly stated? Is not one view of it fairly stated? Is not there evidence tending to show the case as stated? No matter how impotent, are there not facts in evidence that direct the mind to the state of case we have stated?

Did the original conflict end? Was there a new conflict? Was the conflict continuous from the assault at the table until the fatal shot? Was there a cessation? Who was the judge of these facts? The judge? No. The jury? Yes. Who decided—the jury? No. The judge? Yes. Where was the law when this farce was being played? It was under the feet of the court, being trodden on and stamped into the ground. (Jones's case, 17 Texas Ct. App., 603; Stoffer's case, Horrigan & Thompson's

Argument for the appellant.

cases of self defense, 218, and notes cited with approval in White's case, 23 Texas Ct. App., 154.)

In Stoffer's case it is said: "A conflict is the work of at least two persons, and when one has wholly withdrawn from it that conflict is ended, and it can not be prolonged by the efforts of him who remains to bring on another. It is very true that the original assault may have aroused the passions which impelled the pursuer to take vengeance upon his adversary; and if death should ensue from his act it might be entirely sufficient to mitigate his crime. But it would still be a crime. * * * * A line of distinction must be somewhere drawn, which, leaving the originator of a combat to the necessary consequences of his illegal or malicious conduct, shall neither impose upon him punishment or disabilities unknown to the law, nor encourage his adversary to wreak vengeance on him rather than to resort to the legal tribunals for redress, and we think upon principle and the decided weight of authority, it lies precisely where we have indicated. * * * * When he has succeeded in wholly withdrawing himself from the contest, and that so palpably as at the same time to manifest his good faith, and to remove any just apprehension from his adversary, he is again remitted to his right of self defense and may make it effectual by opposing force to force."

The doctrine here laid down is so consonant with common sense and right reason, that it seems to us utterly impossible to traverse it. A conflict must have an end; it can not be prolonged forever. If it be said that it continues beyond an absolute cessation—when the originator voluntarily abandoned the combat—when he is quiescent in the face of unlimited power to continue violence—and the assaulted party has left the presence of his assailant and has himself reached a place of quiet and indisputable safety—then truly there would be no end to the combat; but the original assailant would be an Ishmaelite, subject to be destroyed at any time in the future by the party he had at one time assailed. Such a doctrine can not be tolerated for a moment in a country where law and order govern the people.

If the original conflict in this case had not ended when the parties had separated themselves (and, certainly, it can make no difference who did the act of withdrawing, provided the other consented to, or did not oppose the withdrawal), and deceased had reached the portico, out of sight of appellant, then when would it have ended? The question answers itself. An end is

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an end. A thing ends when it ceases—unless it be like a ditch, the oftener you cut off the ends the longer it gets. Surely, it is not needful that we elaborate this point further. Logic, reason and every day common sense join hands, and in one voice cry out that the law in its power and purity has not been administered.

W. L. Davidson, Assistant Attorney General, for the State.

WILLSON, JUDGE. Notwithstanding the voluminous record in this case, there are but two questions of importance presented by it for determination. Those questions are: 1. Did the trial court err in omitting and refusing to instruct the jury upon the law of self defense? 2. Did it err in omitting and refusing to instruct the jury upon the law of manslaughter. The answers to these questions must be found in the evidence. The charge of the court is always sufficient if it distinctly sets forth the law applicable to the evidence; and it is only necessary to give such instructions as are applicable to every legitimate deduction to be drawn from the facts in proof. (*Evans v. The State*, 13 Texas Ct. App., 225.) The charge must be tested by the evidence. Where the issue of self defense is not *fairly* raised by the evidence, no charge upon that issue is required, or should be given. (*Smith v. The State*, 22 Texas Ct. App., 316; *Wallace v. The State*, 20 Texas Ct. App., 360.) In the absence of evidence tending to establish, or that creates a doubt, as to whether the homicide be of a lower grade than murder, it is unnecessary and improper for the court to charge upon manslaughter. (Willson's Texas Cr. Laws, section 1030; also sections 986 to 1070.)

Briefly but substantially stated, the evidence in this case is as follows: At the time of the homicide the defendant was the sheriff of Medina county, in the court house of which county the killing occurred. Deceased was a lawyer, a resident of San Antonio, and was in the court house of Medina county, attending to business in the office of the county clerk. Defendant and deceased were not on friendly terms. They were at enmity with each other. The cause of this state of feeling between them is not fully disclosed by the evidence, nor was it material that it should have been. Defendant is a large, athletic, physically powerful man, while the deceased was a small man, crippled in one arm. Deceased was sitting before a desk in the clerk's office, engaged in writing or in the examination of records.

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There was but one other person in the office, an aged man, who testified as a witness in the case. Defendant went into the office, saw the deceased, the side of deceased being towards the door through which defendant entered the office. Upon seeing deceased and the old man, defendant stopped a moment, looked at the old man, then calmly approached the deceased, and without warning began striking deceased on the head with his fist. Deceased turned his head toward defendant and threw up his arm, as if to protect himself from the blows being inflicted upon him by the defendant. Defendant then seized a large mucilage bottle which was about half full of mucilage, and which weighed more than one pound, and with this bottle struck deceased over the head, continuing so to strike until the force of the blows shattered the bottle. Deceased, wounded, bleeding and staggering, fled from the room, defendant following him closely. Deceased passed out of the room door into a hall and thence on to a porch a few feet distant, drew a pistol, wheeled suddenly around and fired back into the hall which he had just passed through. Defendant, at the time of this shot by deceased, was standing at the office door, with his left hand upon the door facing, his right hand hanging down by his side, his head just outside the doorway, and facing in the direction of the deceased, and the remainder of his person inside the office. When deceased fired back into the hall defendant instantly drew his pistol, fired and killed the deceased, the deceased firing a second shot almost simultaneously with the fatal shot fired by the defendant. These are the leading facts of the case.

Do these facts fairly raise the issue of self defense? We think not. Let us apply the law to them. It is an elementary principle of the law that self defense is a *defensive*, not an *offensive* act, and must not exceed the bounds of mere defense and prevention. There must be at least an apparent necessity to ward off by force some unlawful and violent attack. It is a right based upon and limited by necessity. (Willson's Texas Crim. Laws, sec. 969.)

In this case, to our minds, the evidence shows that no such necessity as the law contemplates as a justification for homicide existed. Defendant was inside the room, protected by impenetrable rock walls from the shots of the deceased. Deceased was not advancing upon him, but was standing upon the porch, firing back into the hall. All that the defendant had to do to fully protect himself from the shots of the deceased was to with-

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draw his head from the door. This done and he was safe. He had every advantage of the deceased. He was cool and collected, armed with a six shooter, securely ensconced in walls of stone. His adversary was wounded, bleeding and excited, and could not advance upon or get a shot at the defendant without exposing himself to a fair and first shot from the defendant.

It is true that a person when unlawfully attacked is not bound to retreat in order to entitle him to the benefit of the plea of self defense. But that rule can not be made applicable to the facts of this case. It did not require retreat on the part of the defendant to place himself beyond the reach of danger from the deceased. It required only a cessation of hostile pursuit of the deceased. He had not ceased such pursuit. He had not abandoned the attack; he was still following it up, but cautiously and coolly, evidently, as we think the facts show, hoping and expecting that the deceased in his bruised and half crazed condition, would, by some act, furnish a faint excuse for a fatal shot. He did not miscalculate the result. He saw his opportunity, and with the coolness of a practised slayer he availed himself of it. We fail to perceive from the evidence that any *necessity* for the homicide existed.

But, again, to one who brings on an affray or who prepares himself for an encounter in which he intends to wreak his malice, the plea of self defense is not available, though his own life be imperiled in the affray. If a person by his own wrongful act brings about the necessity of taking the life of another, to prevent being himself killed, he can not say that such killing was in his necessary self defense. A person can not avail himself of a necessity which he has knowingly and willfully brought upon himself. (Willson's Texas Crim. Laws, sec. 981.) If a person voluntarily engage in a combat, knowing that it will or may result in death, or some serious bodily injury which may produce the death of his adversary or himself, he can not claim that he is acting in self defense. (Willson's Texas Crim. Laws, sec. 982.)

Apply these rules to the facts. Defendant brought on the affray, and evidently with the intention to wreak his malice upon the deceased. If any necessity arose for him to kill the deceased to protect himself from injury, that necessity was produced by his own willful and malicious act. It is argued by his counsel that if he made the assault upon the deceased in the first instance with no intent to kill or to inflict serious bodily harm upon him, but with the intention merely to inflict upon him an ordinary battery,

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he would not be wholly deprived of the right of self defense, but that, under the doctrine of imperfect or abridged self defense, he would not be guilty of a higher grade of homicide than manslaughter.

Without pausing to discuss the doctrine of imperfect self defense, we will dispose of the matter by saying that in our judgment it is not applicable to the evidence in this case. As we view the evidence, the defendant deliberately, and with a formed design to kill the deceased or to inflict upon him serious injury, which would probably result in death, made a violent, dangerous and brutal assault upon him. Even a battery with the fist of a man of his great physical weight and strength, inflicted upon an emaciated, feeble and crippled man, such as the deceased was proven to be, would be capable of inflicting serious bodily injury which might probably cause the death of the assaulted party. But, not content to use the greatly superior physical power which nature had endowed him with, he resorted to the use of a dangerous, if not a deadly, weapon, and with it inflicted blow after blow upon his helpless and unresisting victim. He used this weapon until it was shattered into fragments by the force of his ponderous blows. What intent was actuating him throughout this brutal assault? Was it merely to inflict an ordinary battery? It would be doing violence to the truth and to reason to so conclude. It is manifest to our minds from the evidence that the assault was made by him in the first instance with a deadly intent, with a heart regardless of social duty and fatally bent on mischief; with the purpose and formed design that such assault should result in the death of the man he hated. There is no room, it seems to us, for the impartial mind to reach any other conclusion from the evidence as to the intent of the defendant. We can not construe the facts so as to make them fairly raise the issue of even imperfect self defense. We are clearly of the opinion, therefore, that the court did not err, but acted properly in omitting and refusing to charge the jury upon the law of self defense.

This view of the matter disposes also of the question as to manslaughter. It is only upon the theory of imperfect self defense that manslaughter, in this case, could be predicated, and as imperfect self defense does not arise upon the facts, neither does the issue of manslaughter.

We have given to this case, and to each question presented by the record, thorough consideration. We have had the benefit of

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able and exhaustive arguments and briefs from counsel for the State and the defendant. We have arrived at our conclusions not hastily, but deliberately and thoughtfully, and our undivided and mature judgment is that the conviction is in no respect erroneous, and should be affirmed; and it is so adjudged.

Affirmed.

Opinion delivered January 28, 1888.

APPENDIX.

By some oversight the two cases which follow were omitted from the volumes to which they properly appertain. Inquiry having been made for them, they are now inserted. The rulings in the first of these cases are important and novel.—REPORTERS.

24	706
29	48
24	705
33	319
24	705
35	460

NED ANDERSON v. THE STATE.

Tyler Term, 1886.

1. **PRACTICE—PERJURY.**—Under the rule of the common law, and under the statutory law of many of the States of the Federal Union, a false statement under oath, made in the progress of a judicial proceeding, can not be assigned as perjury, unless the tribunal sitting in judgment upon the proceeding not only had jurisdiction of the matter, but when its jurisdiction had actually attached. But, under the Constitution and the statutory laws of this State, the rule is more comprehensive, and a false statement may be assigned for perjury if it was made in the course of a judicial proceeding before a court of competent jurisdiction over the subject matter of the proceeding, although its jurisdiction had not actually attached. See the opinions, both on the original hearing and on the motion for rehearing, for an elaborate discussion of the principles underlying the rule.
2. **SAME—CASE STATED.**—The perjury assigned in this case was the alleged false testimony given by the accused upon the trial, in a justice's court, of one Green Wright, upon a charge of carrying a pistol. The prosecution against Wright was based upon a complaint and information, the former of which is required by law to be verified by the oath of some credible person. Evidence was introduced upon this trial which tended strongly to show that the complaint under which the prosecution of Wright was had was not sworn to; and upon the theory that, if the complaint was not sworn to, the jurisdiction of the justice of the peace had not attached in the Wright case, a false statement by accused in that proceeding was not assignable as perjury, the accused asked the trial court to charge the jury that, if they had a reasonable doubt that the complaint was sworn to, they should acquit. *Held* that, under the rule first announced, the trial court did not err in refusing the special charge.

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2. **SAME—FACT CASE.**—A conviction for perjury, to be legally obtained, must be had upon the testimony of at least two credible witnesses, or that of one credible witness strongly corroborated by other evidence. See the statement of the case for evidence which, though conflicting, is held sufficient to support the conviction for perjury.

APPEAL from the District Court of Henderson. Tried below before the Hon. F. A. Williams.

The conviction in this case was for perjury, and the penalty assessed against the appellant was a term of five years in the penitentiary.

G. N. Adams was the first witness for the State. He testified that he held the office of justice of the peace of precinct number one, of Henderson county, Texas, on the thirtieth day of November, 1882, on which day the case of the State of Texas v. Green Wright, for carrying a pistol, was tried before him. That prosecution was upon complaint and information, and was instituted before T. P. Seay, the witness's predecessor in office, but was not disposed of by him, and was one of the first cases tried before witness upon his accession to the office of justice of the peace. Ned Anderson, this defendant, appeared and testified before the witness on that trial as a witness for the State. He testified substantially as follows: "On the night of October 28, 1882, there was a festival at the old Masonic hall, given by the colored people, where about one hundred and fifty colored people congregated. This was about three or four hundred yards from the court house in Athens. I was present, and Green Wright was also there. I saw him there. Some time early in the night a difficulty arose between one Sharp Ellick and Ike Manion. This was in the house. They were finally separated in the house. Green Wright and Ike Manion went out of the house, and soon afterwards the difficulty was resumed on the outside, about ten or fifteen steps north from the house. This last difficulty lasted but a few moments, but during the time it lasted a pistol was fired from some point outside of the house. Immediately after this difficulty, Green Wright came to where I was standing on the hall gallery near the steps—Wright coming from the north—and ran his hands into the pocket of a pair of saddle bags he had with him, and pulled out a pistol, which he showed the witness and returned to his saddle bags, with the remark: 'You see how easily I could have hurt those boys if I had wanted to.' Wright then had his saddle bags over his shoulder. We were standing

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near the gallery or portico leading up to the door of the hall, and at the west or front of the same." Anderson, this defendant, testified before the witness that the only time and place he saw Wright on that night was on the portico when he showed him the pistol. The witness, who was then unfamiliar with the duties of his office, administered the oath to the defendant, reading it from the statutes. The hall or portico of the Masonic hall, testified about by defendant, was between six and eight feet wide. The steps mentioned by defendant in his testimony in the Wright case mounted the portico.

On his cross examination the witness said that he was not at the festival at the Masonic hall on the night of October 28, 1882, and knew nothing of his own knowledge of what occurred there on that night. At this point a complaint, signed by Spencer Hill and attested by T. P. Seay, justice of the peace for precinct number one of Henderson county, charging Green Wright with unlawfully carrying a pistol on October 28, 1882, and filed on that day by T. P. Seay, justice as aforesaid, was exhibited to the witness, and, respecting it, the witness testified as follows: "I recognize this as being the complaint on which Green Wright was placed on trial on November 3, 1882, and to the best of my knowledge it is the same. It has been in my custody all the time since then. I can't say for certain, nor will I be positive, that the signature to the jurat of that complaint is the genuine signature of T. P. Seay. In some respects it resembles my handwriting, but in others it does not. I must say that if Esquire Seay signed it he must have been drunk at the time, a habit to which he was then very much addicted. It does not look like Esquire Seay's signature. I did not sign it myself, nor have I any recollection of 'Squire Seay asking me to sign it for him. I do not remember that the county attorney ever asked me to amend the complaint by signing Seay's name to it. The complaint is now just like it was when I received it from my predecessor. The body of the complaint was written, according to my recollection, by Mr. Gossett, then the county attorney."

M. E. Richardson and John S. Jones, the attorneys for Green Wright on his said trial, were next introduced by the State, and testified substantially as did Justice of the Peace Adams, as to the testimony of the defendant on the trial of Wright. Jones testified, in addition, that this defendant was the only witness introduced and examined by the State in the prosecution of Wright. On that trial witness asked defendant what kind of a

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pistol it was that he saw in the hands of Wright. Defendant replied that he was unable to tell whether it was a single shooter or a five shooter; that he only saw the handle, hammer and barrel. Witness then asked him if he saw the cylinder. He hesitated a moment, and then asked if witness meant the "round thing that balls were in?" The witness told him that that was what he meant, and defendant replied that he saw it. Witness then asked: "And still you say that you can't tell whether it was a single or five shooter?" Instantly the defendant replied: "Oh, yes; it was a five shooter."

Mr. Richardson, on cross examination after scrutinizing the complaint, testified that he did not know who wrote the signature to the jurat. It did not look like the handwriting of Esquire Seay, but it did somewhat resemble the handwriting of Esquire Adams. He recognized the signature to the file mark on the complaint as that of Esquire Seay. Witness was familiar with the handwriting of Esquire Seay. In his opinion, the signature attached to the jurat of the complaint was not the signature of Esquire Seay. Mr. Jones, on his cross examination, said that at the trial of Wright he observed the defect in the complaint, and intended then, in the event of failing to secure an acquittal, to take advantage of the same on motion in arrest of judgment. He testified, as did Richardson, with regard to the Seay signature to the jurat and file mark.

M. H. Gossett testified, for the State, that he was acting as county attorney of Henderson county in October, 1882, and conducted the prosecution of Green Wright on the trial referred to by the previous witnesses. He testified, as did the witnesses Adams, Richardson and Jones as to the testimony of defendant on that trial. Witness did not know who wrote Seay's signature to the complaint. It did not appear to be written in Seay's handwriting. It somewhat resembled the handwriting of Adams. Witness wrote the complaint, but had no recollection of swearing anybody to it. He could not now say whether or not Seay was present when he wrote the complaint. On his cross examination, the witness said that he was not at the festival at the Masonic hall, and could not testify to anything that occurred there. Several complaints were filed against different parties on account of what transpired on that night, and witness recognized his official signature to the several complaints now shown him. He had no recollection of suggesting to Justice Adams to amend the complaint by signing Seay's name. Seay's signature to the

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file mark was genuine, but witness did not think that Seay's signature to the jurat was written by him.

Green Wright was the next witness introduced by the State. He testified that he was the person tried before Esquire Adams for carrying a pistol, upon the complaint in evidence. He testified also that the defendant, on that trial, was placed upon the stand by the State and testified substantially as detailed by the previous witness for the State. He testified further that, at the conclusion of the first row, which occurred inside of the house, he, witness, passed out of the house, and stepped to a point about fifteen or twenty steps north of the house, when the difficulty was renewed outside. It was quelled in a very short time, but while it was in progress, a pistol was fired from a point between where the witness was then standing and the house. Ben Young, Willis Houston and Ike Manion were standing near the witness at the time. Immediately after the pistol was discharged, Jim Simmons approached the witness in a threatening manner, and asked him if he was taking up the difficulty, and if witness wanted to fight. The witness at once turned from him, remarking, "I will not fight you, but I will fight you with the law." The witness then went direct to his horse, which was hitched at a point about twenty yards north of the hall, mounted, and went to town at once, to get officers. The town was north from the hall between three and four hundred yards. Witness followed the main road to a point about half way to town, when he took a left hand road, and entered the square on the west side, whence he rode to Titsworth's saloon, on the north side, where he saw a number of men standing, and asked those men where he could find the officers. They replied that the officers were some where about the jail. Witness went to the jail at once, but found no officers. He then went back to the hall, taking the route through the east side of the square. He met Joe Manion at a point about half way between town and the hall, and the said Manion gave witness his saddle bags. Witness rode his gray horse in either a gallop or a fast trot. When he reached the hall he got down from his horse and hitched him, and started to the crowd, already joined by the officers. Some body in the crowd exclaimed: "Green Wright is the man who has got the pistol." The officers then searched witness, going through his pockets and saddle bags, but found no pistol. Witness had nothing in his saddle bags but an empty bottle. He had no pistol on or about his person on that night at the festival, nor

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did he have his saddle bags at the hall until he returned from town, as stated. When the witness left town that night to go to the festival, he left his saddle bags in town with Joe Manion, who proposed that he would get some whisky and put in them if witness would go home with him on that night. Witness did not see his saddle bags after he gave them to Joe Manion until on his return to the hall, after the rows, he met Manion on the road, as stated. The pistol was fired during the last row, from a point ten or fifteen steps south of and behind the witness, and witness had no idea who fired it. Witness did not see a pistol at the festival nor about the hall that night, but heard the report when it was fired. The witness did not go back to nor towards the hall after he left it at the conclusion of the first row. He had no conversation whatever with the defendant at any time that night.

Cross examined, the witness said that Joe Manion was his brother-in-law. Ike Manion, Joe Manion's son, and Sharp Ellick got into a row near the barber shop before the festival commenced, and the row was twice renewed after the parties got to the festival. The witness, when searched by the officers, had got his saddle bags from Joe Manion. The officers arrested witness and several other parties that night, and took them to the sheriff's office, when Mr. Gossett fixed up the papers to enable the several parties to give bond. The witness had no recollection of seeing Mr. Seay on that night.

Joe Manion testified, for the State, that he was in Athens on the night of the colored people's festival at the old Masonic hall. He met Green Wright in town and asked him to go out home with him on that night, and help him pick cotton. Wright agreed to go if witness would get some whisky. Witness agreed to do so, and Wright gave him his saddle bags, which contained the empty bottles. Witness took the saddle bags, and Wright went off towards the hall. Witness then "knocked about town" for a while, meeting Ben Anderson, for whom he got some bacon from Mr. Lammons. He then went to lawyer Manion's office, sat down and talked with Mr. Manion for some time. Witness and Mr. Manion then left the office, and went down the street towards the old Masonic hall, in which the festival was being held. They stopped on the south side of the square, where they talked for a few minutes. While at that point, the witness heard the report of a pistol, and some body hallooed. Witness thought he recognized in the halloo the voice of his son, and he

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separated from Captain Manion, and went towards the hall. During all this time witness had Wright's saddle bags, but had not yet procured the whisky. To reach the hall from the point on the square where the witness was when he heard the report of the pistol, the witness had to travel about one hundred yards east, to strike the main road. About the time that witness struck the main road, he heard the rumbling of a wagon in town, and the bark of a dog which he recognized at once as the bark of his dog, which he had left with his wagon. Witness then turned and went back to town, without going to the festival. When he reached a point a short distance from where he started back, the witness met Green Wright, riding rapidly; and Wright told him that he had been to town to get the officers. Witness then gave Wright the saddle bags. There was no pistol in the saddle bags at any time while they were in the hands of the witness. Witness was not at the festival and knew nothing about anybody having a pistol there on that night. Witness had no recollection of seeing Mr. Seay on that night.

Trav. Anderson testified, for the State, that he attended the festival on the night of the difficulties. He did not see the row in the house, but saw a number of people when they came out of the house just before the second fuss, which occurred outside. Green Wright came out of the hall among the first, and passed the defendant at a very short distance. He had gone perhaps ten steps when Simmons passed witness. In passing witness, Simmons dropped a pistol, which he said was his, on witness's foot. Green Wright did not have a pair of saddle bags when he passed the witness.

On his cross examination the witness said that, at the last term of the court, he told the counsel for the defendant that it was Wright's pistol that fell on his feet, but he corrected that statement before he was placed on the stand by telling them that he was mistaken in that statement, and that it was Simmons's pistol. Witness remembered that he told Attorney Bishop at the September term, 1884, of the district court that it was Wright's pistol that fell on his feet, but at the very next term he told Mr. Bishop that he was mistaken in that statement, because Simmons told him that it was his pistol, and that he went back next day and got it.

Ben Young testified, for the State, that he was with Green Wright, about twenty steps north of the hall, when the pistol was discharged on the night of the festival. It was fired by

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some person unknown to witness, at a point about ten feet south of the point where witness and Wright were then standing. Wright had no saddle bags with him at that time. The pistol was not fired by Wright. Wright left at once, saying that he was going to town to get the officers to stop the fight. He went toward town, and not toward the hall. He got back from town a few moments after the officers arrived, and then had his saddle bags. He and others were then searched by the officers, but no pistol was found. This witness also detailed the occurrences at the hall as they were detailed by Wright. Witness had no recollection of seeing Justice Seay on that night.

Willis Houston testified, for the State, substantially as did the witness Young, and, in addition, that he was a stranger to every body at the festival except Wright, and, consequently, he stayed with Wright throughout the night, and knew that Wright had no saddlebags before nor at the time of either of the difficulties. Just after Wright left, declaring that he was going to get the officers, one Jim Simmons struck the witness a severe blow with a pistol. Witness then ran up the road about a hundred yards, where he met the officers. The officers went on to the hall, and witness followed. Wright overtook witness and the officers about the time they got to the hall. On his cross examination the witness said that he started to run towards town after he was struck over the head with the pistol. He met the officers, and, a short distance further on, he met Wright. If Wright then had any saddle bags, witness did not see them.

Deputy Sheriff Reirson testified, for the State, that a few minutes before the pistol fired at the old hall on the night of the negro festival, as testified by previous witnesses, he passed Captain Manion's office, and saw Captain Manion and Joe Manion in conversation. Joe Manion then had a pair of saddle bags on his arm. Soon afterwards witness heard the shot fired at the hall. He went at once to the court house to get other deputies to go with him to the hall. While at the court house he saw somebody whom he did not recognize ride across the west side of the square on a gray horse. Witness, the sheriff and Tom Dean then went to the hall. About the time they reached the crowd Wright rode up on a gray horse, hitched it and walked towards the crowd. Defendant cried, loudly: "Green Wright has got the pistol." Others said the same thing. Green Wright's person and his saddlebags were searched, but no pistol was found. The saddlebags contained nothing but two empty bot-

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ties. Witness had no recollection of seeing Esquire Seay that night. Sheriff Davis corroborated Reirson as to what occurred at the hall.

W. G. Titsworth testified, for the State, that a few minutes after the shot was fired at the old Masonic hall on the night of the festival, Green Wright, riding a gray horse, passed the witness's saloon, and asked for the officers. He then rode on towards the jail.

The State rested.

The defense first introduced in evidence the complaint signed by Spencer Hill, and ostensibly attested by T. P. Seay, justice of the peace, which charged Green Wright with unlawfully carrying a pistol on October 28, 1882.

F. J. Richardson testified, for the defense, that he attended the festival at the old Masonic hall, on the night of October 28, 1882. The witness, this defendant and Ike Simmons were designated as marshals of the occasion, their duties being to preserve order. Just before the first difficulty, which occurred in the house, the witness observed the defendant and Green Wright in consultation, and, having occasion to change some money, he approached them. As he did so he saw Wright take a pistol from his saddle bags, which he had on his shoulder, and show it to defendant.

Cross examined, the witness said it was a distance of twelve or fifteen feet from the gallery to the place in the southwest corner of the room where defendant and Wright were talking when the latter showed his pistol to defendant. An intervening wall would prevent a person standing at the outer edge of the gallery from seeing defendant and Wright at the point in the southwest corner of the room. Witness did not know what character of pistol it was that Wright showed to defendant.

Jim Simmons testified, for the defense, that, a short time before the first difficulty in the house, he saw the defendant and Wright about half way down the house, on the south side, talking angrily to each other. Wright took a pistol from his saddle bags and showed it to defendant.

On his cross examination, this witness testified that, notwithstanding he had been convicted and fined for having a pistol on that night, and had paid his fine, he did not in fact have one, and he never at any time told Trav. Anderson that he had one. He did not strike Willis Houston over the head with a pistol on that night.

Spencer Hill testified, for the defense, that he attended the

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festival, and saw the firing of the pistol mentioned by previous witnesses. The witness took Green Wright to be the man who fired that pistol, and accordingly, when the making of affidavits charging the bearing of arms commenced, he made the affidavit against Wright. Mr. Gossett wrote the affidavit. "Witness had no recollection of seeing Esquire Seay on that night. Witness had a pistol himself on that night. On being arraigned next day therefor, he pleaded guilty and paid his fine.

Beauregard Anderson testified, for the defense, that he attended the festival, and, about thirty minutes before the first row, he saw defendant and Wright talking, upon apparently friendly terms, in the southwest corner of the house. Wright showed defendant a pistol, which he took from a pair of saddle bags which he had with him. After the arrest of the several parties, the witness was sent to Esquire Seay's house to summon him to the jail. Seay sent word that he was sick, and did not go.

Cross examined, this witness denied that he ever told Mr. Algie Bass that he did not see Wright or anybody else have a pistol at the festival. He denied that on the former trial of this case he testified that he saw Wright show a pistol to defendant at a point just outside of the door, and near the steps of the gallery.

Johnson Winfield testified, for the defense, that just as the crowd started out of the house, after the first row, he saw Wright with a pair of saddle bags in one hand, and something in the other which he took to be a pistol. To the best of the witness's knowledge and belief, Wright fired a pistol on that night a few steps from the house.

Mary Allen testified, for the defense, that she saw Green Wright when he first got to the festival. Witness and Paulina Allen were running a table at that festival. When Wright approached their table, Paulina laughingly asked him if he had brought his saddle bags (which he had on his shoulders) in order to buy out the festival. Witness saw no one else at the festival with saddle bags.

Paulina Allen testified as did Mary Allen.

Ben Anderson, the father of the defendant, testified, in his behalf, that he met Joe Manion in town on the night of the festival, and was with him for some time, during which time said Manion bought him some bacon. Witness did not recollect seeing any saddle bags in the possession of Joe Manion on that night.

The defense closed.

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Algie Bass testified, for the State, in rebuttal, that some time subsequent to the festival he asked Beauregard Anderson, in the presence of Trav. Anderson, if he saw Green Wright have a pistol on the night of the festival. Beauregard replied that he did not see Wright nor any one else have a pistol on that night.

A. B. Watkins testified, for the State, in rebuttal, that on the previous trial of this cause Beauregard Anderson testified that he saw Green Wright at the negro festival, and that he, Wright, had a pistol on that occasion, and that when he saw Wright with the pistol he was standing just outside of the house, near the steps.

Captain George D. Manion testified, for the State, that he raised Joe Manion from a boy, and was always visited by Joe when he came to town. Joe was in town on the night of the negro festival, and came to witness's office. After a long talk, witness and Joe walked across the square and stopped. They soon heard a pistol shot and a voice near the old masonic hall. Joe remarked: "That is my son Ike's voice. If he has got into trouble I want you to help him out." Witness could not now remember where he and Joe parted, nor could he now say that Joe did or did not have a pair of saddle bags with him.

The motion for new trial raised the questions discussed in the opinion.

J. B. Bishop, for the appellant.

W. L. Davidson, Assistant Attorney General, for the State.

HURT, JUDGE. One Green Wright was tried before a justice of the peace for carrying a pistol on or about his person. The trial was had upon a complaint, and upon the hearing appellant was a witness, and, being charged with giving false testimony, was indicted and convicted of perjury.

There is evidence in the record strongly tending to prove that the complaint was not sworn to. This being the case, it is insisted that the court should have instructed the jury that, if they had a reasonable doubt as to whether the complaint was sworn to, they should acquit the defendant. Concede the fact that the complaint was not sworn to, does it follow that defendant could not commit perjury upon the trial under such complaint? There is no question as to the jurisdiction of the justice to hear and de-

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termine the cause then before the court. The court had jurisdiction of the offense, the subject matter of litigation. But appellant insists that the jurisdiction had never attached in that case, and hence there was no authority in the justice to swear the defendant, and, therefore, no perjury.

Upon this subject Mr. Bishop says: "Thus we are led to the further proposition that not only must the tribunal have jurisdiction of the cause, as before explained, but the cause must be properly in court." (1 Bish. Crim. Law, sec. 1028.) To the same effect are all the authorities accessible to us at this place, for we have examined very carefully all of them. We have found two English cases bearing upon this question, one of which is directly in point. In *Regina v. Millard*, Dean's C. C., 166, an information, not under oath, was laid before a justice against a prisoner for unlawfully damaging a carriage, and the prisoner was indicted for perjury committed on the hearing of that information. It was objected that the information ought to have been made under oath, but it was held that, as the law did not require the information to be sworn to, therefore the justice had jurisdiction. It seems very clear that the converse would have been held if the law had required the information to be on oath.

But we have a case precisely in point in *Regina v. Scatton*, 5 Queen's Bench, 493. The act of Parliament rendered it necessary that an information should be verified on oath of a credible witness before any proceeding be taken for summoning the party accused or compelling his appearance. The information not being thus verified, it was held that the justice had no jurisdiction, and consequently a person giving false evidence on such an occasion is not guilty of perjury. We deem it unnecessary to cite further authority in support of Mr. Bishop's proposition, namely, that the court must not only have jurisdiction of the cause of action, but that the jurisdiction must have attached in the particular case.

From these authorities it would seem to follow that the position of appellant is correct. We have no doubt of its correctness at common law. But how stands the question when viewed in the light of the provisions of our Constitution? At common law, and, we suppose, in most of the States, to plead successfully former acquittal, the first trial must have been upon a good and sufficient indictment, information or complaint. Is this the case in this State?

Section 14 of the Bill of Rights reads: "No person for the

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same offense shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction." In some States it is held that jeopardy does not attach until verdict is rendered. In this State it is now held, and was at the time of the making of the Constitution, to be the law of this State that, where the accused pleads to a good indictment before a court of competent jurisdiction, and the jury are sworn to try the case, jeopardy attaches.

Now, if this be so, why provide that no person shall again be placed upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction? Is it not evident that this is inhibited by the jeopardy clause of the Constitution? Would any court permit a party to be again tried for the same offense, when he had been tried upon a *good and sufficient indictment*, before a court of *competent jurisdiction*, and acquitted by the jury? Does it require a constitutional provision to shield him from a second trial under the above facts? We think not.

But, as it frequently occurs that an accused is placed upon trial for an offense before a court of competent jurisdiction upon indictments vicious *in substance*, and that long and tedious trials are had, resulting in verdicts of acquittal, was it not the intention of the Constitution to say to the State that the accused shall not be tried again for the same offense though the indictment was in substance insufficient? After a most thorough examination of this subject, we are of the opinion that this was the intention of the framers of the Constitution. We could enlarge upon this subject, but have not the time.

Before leaving this subject we desire to give some illustrations as to what we mean by the *same offense*. A is charged, in the first instance, with the murder of B by shooting him. He is acquitted. In the second indictment he is charged with the murder of B by stabbing him with a knife or by striking him with a stick or bludgeon. The offenses are not the same, and, if the first indictment had been good, A could not have been convicted of the offense charged in the second indictment.

Again: A is charged with the theft of a bay horse, the property of B, and is acquitted. He is again placed upon trial for the theft of a white horse, the property of B. Though the transaction be the same, the offenses are not the same. But let us suppose that the indictment charging the theft of a bay horse, the property of B, fails to allege that it was fraudulently taken,

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or that it was taken without the consent of the owner, or fails to allege that the accused took the property with the intent to deprive the owner of the value, etc. If the accused is acquitted, he can plead this acquittal in bar of another prosecution under a *good and sufficient* indictment—one which charges him with the theft of the same bay horse, the property of B, on an indictment containing all the elements of theft properly alleged.

If, therefore, the accused can be acquitted under a bad indictment, information or complaint, the court having jurisdiction of the ~~cause~~ of action—the offense—and this acquittal can be successfully pleaded to a second prosecution, may not a witness be guilty of perjury for false swearing upon the trial, though the jurisdiction of the court may not have lawfully attached? For, if the court has jurisdiction of the offense—the subject matter—and a trial results in a verdict of not guilty, the State is forever debarred from another prosecution for the same offense; and the false testimony of a witness may, and no doubt would, in many cases contribute to an acquittal, and thus defeat the ends of justice.

Just here let us give another illustration. All prosecutions originating in the county court must be presented by information, and the information must have for its support a complaint verified by the affidavit of some credible person. Now, let us suppose the accused is placed upon trial upon a good information, and is convicted and fined one hundred dollars. He pays his fine and is discharged. Afterwards it is discovered that there was no complaint. Now, then, the jurisdiction of the county court had not properly attached, and yet the accused has been tried upon a good information before a court of competent jurisdiction. Will it be contended that because there was no complaint, a witness who swears falsely, deliberately, willfully and intentionally can not, and should not, be convicted of perjury when it may be that the accused was convicted solely upon his false testimony? We would hesitate long before we would sanction such a doctrine. But, suppose the accused be acquitted by verdict of not guilty, this would be a bar to another prosecution, when it may be that this verdict was obtained by the false testimony of a witness who, if we are wrong in our views upon this subject, is beyond the reach of the penal laws of this State. To this we can not agree.

Concede that the jurisdiction of the court had not properly attached to the particular case, yet there was a trial before a court

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of competent jurisdiction, upon a charge of an offense, and, though not properly before the court, its adjudication, if resulting in a verdict of not guilty, has such force and effect as will enable the accused to plead that the matter was *res adjudicata*, plead this trial before a court of competent jurisdiction and verdict of not guilty in bar of another prosecution. The judgment in such a case would not be a nullity as to both the State and the accused, for, while the State would be bound by it, the accused, if convicted, would not. The State being bound by such a judgment, by reason of such a trial and verdict, we are clearly of the opinion that a witness swearing falsely upon such a trial would be guilty of perjury.

In the indictment, perjury is assigned upon both material and immaterial matter. The court below very carefully confined the jury to that which was material and properly assigned as perjury, requiring the jury to believe beyond a reasonable doubt, from the evidence, the material matter which had been properly assigned as perjury, before they could convict; thus eliminating all immaterial matter from the issue. But the jury were instructed to look to all the evidence before them which, in their judgment, bore upon the question, in determining whether or not defendant testified on the trial of Green Wright that he (appellant) saw Wright have a pistol on the occasion referred to in the charge above, and, if so, whether such statement was true or false.

Counsel for appellant objects to this part of the charge because, as it is urged, the jury were authorized by it to convict upon immaterial matter. We do not so understand the charge. Perjury can be established by circumstances, as well as may other offenses. Let us suppose that the witness in his testimony gave a circumstantial account of the material facts, and that perjury is assigned upon the material facts, the prosecution would be permitted to prove that he swore falsely as to the circumstantial, though immaterial, in aid or corroboration of the evidence adduced to prove that he swore falsely as to the material facts.

There are other objections urged to the charge, but we do not believe they are obnoxious to the criticisms urged by counsel, and, taken as a whole, it is a good application of the law to the facts of the case.

Counsel assigns for error the overruling of the motion for new trial, because the verdict is unsupported by and contrary to the

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evidence. Perjury must be established by the testimony of at least two credible witnesses, or of one witness corroborated strongly by other evidence, as to the falsity of defendant's statements under oath. One witness swore positively to the falsity of defendant's statements, and he was *very strongly* corroborated by the testimony of other witnesses, as well as by the circumstances of the case. Hence, viewing the case in the light of the evidence which supported the verdict, we think the measure of the law has been filled. But, if the witnesses for defendant swore the truth, there was no perjury. There being a conflict, it was the province of the jury to settle this matter, which was done against the veracity of his witnesses; from which this court can not furnish relief.

After a mature consideration of this case, we have found no such error as will justify a reversal of the judgment, and it is affirmed.

Affirmed.

Opinion delivered at Tyler, December 8, 1886.

ON MOTION FOR REHEARING.

HURT, JUDGE. The question herein raised arises on a motion for rehearing. While it was considered and passed upon in the opinion affirming the judgment, it was not discussed at length. Being again pressed in support of the motion, it will be more extensively treated.

Perjury was assigned upon the statement that appellant Anderson saw Green Wright have a pistol at the Masonic hall in Henderson county, where the colored people were holding a festival. The charge of the court in the most explicit terms directed the jury to a finding upon the truth or falsity of this statement. The instruction on this head was to the effect that, though they might believe that the other evidence given at the same time and upon the same trial by appellant was false, yet, in order to convict, the jury must conclude that this particular statement upon which the perjury was assigned was false. After this instruction, in which the court carefully confined the issue to the truth or falsity of the statement, the further instruction was given that the jury would look to all the evidence given before them, which, in their judgment, had a bearing upon the question, in determining whether or not defendant testified on the trial of Green Wright that the said Wright had a pistol on the

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occasion referred to; and, if so, whether such statement was true or false.

Upon the trial of Wright for carrying a pistol, appellant, Anderson, testified, in addition to the fact that Wright had a pistol, to certain attendant circumstances, such as that he (Wright) took it out from a pair of saddle bags in the presence of certain named persons. Perjury was assigned upon the concomitant statements also. There was evidence strongly tending to show that each of them was false.

It is evident that, although the charge confined the jury to the statement assigned as perjury, viz., the appellant saw Wright have the pistol at the festival at the time and place named, the jury are required by the charge to look to all the evidence, and hence to all the statements made by Anderson, whether assigned for perjury or not, in determining whether the statement assigned was true or false. To the instruction requiring the jury to look to all the evidence in determining the truth or falsity of the material statement assigned as perjury, counsel for defendant earnestly and with great confidence objects, and in support of the objection relies upon the case of *The State v. Brice*, 43 Texas, 532. The case is in point, and most clearly supports the objection.

Before entering upon a review of the Brice case, we desire to make some observations, with regard to a question sometimes used with reference to perjury. It frequently happens, in well considered decisions of the court, that the words "material," "immaterial," or "facts" are incautiously used. No "facts," "matter," or "statement" is material unless assigned as perjury, nor unless the fact or statement thus assigned is relevant to the issue in the case. This is the case in a particular sense, but not in a general sense. If not assigned as perjury, the fact or statement, though material, and though it could have been properly assigned, and though evidently false, a conviction upon it can not be had.

But suppose the matter or statement is not assigned for perjury, does it follow that because not assigned it can not be relevant and competent evidence in determining whether the statement assigned is or is not false? The Brice case so holds, but to this conclusion we do not agree. Instance the case before the justice against Green Wright for carrying the pistol. Appellant, Anderson, is a witness upon the trial. He swore that he saw Wright have a pistol at the old Masonic hall in Henderson

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county, where the colored people were holding a festival at the date charged in the complaint. The State then closed its examination. Upon cross examination Anderson goes into the particulars, relating, amongst other things, that in the presence of certain named parties he saw Wright take the pistol from his saddle bags. Defendant introduces as witnesses the persons named, and proves beyond question by them that they were present as stated; that they saw Wright, but did not see him have a pistol; that they saw no saddle bags, and that he had none with him. What legitimate use can a defendant make of this impeaching testimony? Undoubtedly it can be used to impeach the witness. The reasoning being that, as he swore falsely about the saddle bags, he also swore falsely about the pistol. This needs no further illustration, it being self evident.

In harmony with this is the case of *Rex v. Gardener*, 8 C. P. 737. Gardener was indicted for perjury in "falsely deposing before a magistrate that the prosecutor had a venereal affair with a donkey, and that the defendant saw that the prosecutor had the flap of his trousers unbuttoned and hanging down, and that he saw the inside of the flap. To disprove this, the prosecutor and his brother were examined. The former negatived the whole statement, and both witnesses swore that they went to the field mentioned in the deposition, and that the prosecutor parted from his brother to see whether the donkey, which was full in foal, was able to go a certain distance; that he was absent about three minutes; that the trousers he had on (which were produced) had no flap. In this case the evidence was held not only admissible but sufficient corroborative proof to sustain a conviction. It must be remembered that perjury was not assigned upon the statement relating to the flaps of the prosecutor's pants, but if in fact there was no flaps to his pants, this would be a very cogent reason for believing that the entire statement with regard to the "venereal affair" with the donkey was a sheer fabrication.

Believing the doctrine of the *Brice* case to be unsanctioned by reason and authority, it is hereby overruled. As also establishing the doctrine that, on a trial for perjury, cognate perjuries may be proved, see *Wharton's Criminal Evidence*, section 53, and *The State v. Raymond*, 20 Iowa, 528.

Separately and in consultation we have carefully examined the statement of facts, with the result of reaching the same conclusion as that announced in the opinion heretofore filed in the

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case. That there is much conflict in the testimony is true, but in passing upon its sufficiency to support the judgment, we are to take as true that which would support the verdict.

Viewing the testimony in this light, we can not say that it does not support the finding of the jury, and the motion for rehearing must therefore be overruled.

Motion overruled.

Opinion delivered at Galveston February 23, 1887.

LAWRENCE A. LOTT v. THE STATE.

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Austin Term, 1879.

1. **INDICTMENT—EVIDENCE.**—The indictment alleged the ownership of the property stolen to be in Columbus C. Littlefield, and the proof disclosed that, though his proper name was Christopher Columbus Littlefield, he was usually known as Columbus Littlefield, and was often addressed as Columbus C. Littlefield. *Held:* That, if the proof showed that he was as well known by the name set out in the indictment as by any other, a conviction otherwise regular would be sustained.
2. **THEFT.**—If the possession of the property was obtained by the defendant from the owner, lawfully and in good faith, its subsequent appropriation by the defendant to his own use, without the owner's consent, does not constitute theft.
3. **SAME—EMBEZZLEMENT.**—A conviction for embezzlement can not be obtained on an indictment for theft.

APPEAL from the District Court of Gonzales. Tried below before the Hon. Everett Lewis.

The opinion discloses the case.

Fly & Davidson, Miller & Sayers and Ireland & Burges, for the appellant.

Thomas Ball, Assistant Attorney General, for the State.

LECTOR, PRESIDING JUDGE. The indictment charges the defendant with the theft of a horse, the property of Columbus C. Littlefield. The jury found the defendant guilty as charged in

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the indictment, and assessed his punishment at five years confinement in the penitentiary, and after the return of the verdict the court adjudged the defendant guilty of theft of a horse, as found by the jury.

The first assignment of error is: "The court erred in admitting any proof of property in Christopher C. Littlefield, when the indictment charged the property to belong to Columbus C. Littlefield, as shown by defendant's bill of exceptions."

On the trial of the cause, Christopher Columbus Littlefield was the first witness introduced by the State; who testified that he was usually called Columbus, and that he was frequently addressed as Columbus C. Littlefield. The defendant then objected to proof of theft of an animal belonging to Christopher C. Littlefield, or Christopher Columbus Littlefield, as the indictment charges the horse stolen to have been the property of Columbus C. Littlefield. The objection was overruled by the court, and the witness proceeded to testify: "In July, 1877, I made a contract with the defendant, Lawrence Lott, by which he was to take charge of my stock of horses, to attend to them and brand them; and he was to receive, in payment for his services, one-fourth of all young colts branded by him. He told me in August that he had branded certain colts, among which he named a dun colt, the one in question, which he said he had put in my brand. I afterwards saw this dun colt, but could discover no brand upon it. I afterwards saw defendant, and told him I could see no brand upon the colt. He said that, owing to the season, he was afraid of the worms, and therefore would not brand it deep. In November or December, after this, I discharged Lott, and the next spring, missing the dun colt, I found it in possession of J. D. Ellis, and went before a justice of the peace at Leesville, proved my property, and recovered it from the possession of Mr. Ellis. At the time of making the contract, I turned over to him the whole of my horse stock then running upon the range. I turned over this particular dun colt at the same time with my other stock. This colt was then about eighteen months old, being a colt of the spring of 1876. It was unbranded. I did not give defendant my consent to sell the dun colt in question. Defendant was simply to look after my horse stock and brand all unbranded stock, and receive in payment one-fourth of the young colts of 1877. The horse was taken in October, 1877."

The State also proved, by J. D. Ellis, that in October, 1877, he

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purchased from the defendant the horse that was subsequently claimed by C. C. Littlefield.

The court, in the fourth subdivision of its charge to the jury, instructed them as follows: "If the jury find from the evidence that the alleged owner of the animal described in the indictment, Columbus C. Littlefield, is the person who is known as Columbus Littlefield, though his true name may be Christopher Columbus Littlefield, then the allegation of his ownership will support a conviction, provided the evidence be sufficient in other material respects."

We believe, when the question arose concerning the name of the person whom the indictment alleged to be the owner of the stolen animal it was competent for the State to show, in support of the allegation in the indictment, that the person was as well known by the name used in the indictment as by any other. As was said by the learned judge who delivered the opinion of the court in the case of *Bell v. The State*, 25 Texas, 574: "By this is not meant that the indictment could not be sustained without showing that the person was as exclusively or as familiarly known by the name used in the indictment as by any other; for this would not be necessary. It would be enough to show that the person was as certainly known to friends and acquaintances of the vicinity by the name used as by any other."

After property has gone into defendant's possession by lawful means, a fraudulent appropriation or conversion of the same to his own use or benefit, without the consent of the owner, would not constitute theft. Littlefield says that all his horse stock, including this colt, was placed in defendant's possession, and "turned over" to him.

The following instruction, among others asked by the defendant, the court refused to give, to wit: "In this case defendant asks the court to instruct the jury if they believe from the evidence that defendant got possession of the colt or horse from the owner by any lawful means, that any subsequent appropriation of the colt or horse in question by defendant would not be theft, and you will acquit the defendant."

We believe, under the facts in this case, that the court should have given the above instruction asked by defendant. Instead of doing this, the lawful possession by the defendant was entirely ignored by the court, and for this the judgment must be reversed. In felony cases the court should give the whole law applicable to the case to the jury, whether requested or not. On

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an indictment for theft the defendant could not be convicted of embezzlement. (Griffin v. The State, 4 Texas Ct. App., 39.) It is not pretended that the possession of the animal in question was fraudulently obtained, or that it was obtained with a view of misappropriating the property.

The judgment of the district court is reversed and the cause remanded.

Reversed and remanded.

Opinion delivered June 27, 1879.●

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A.

ABORTION.

1. See the statement of the case for an indictment *held* sufficient to charge the offense of producing an abortion by an unlawful assault upon a pregnant woman. *Navarro v. State*, 878.

2. In a prosecution for producing an abortion by an unlawful and violent assault, the injured female, although the wife of the accused, is a competent witness against him. *Id.*

3. The prosecutrix in this case, having testified to the violence inflicted upon her by the accused, was also permitted to testify to her subsequent delivery of two dead children, to the condition of the bodies, and, without first being qualified as an expert, to the fact that the abortion was the result of the violence inflicted upon her by the accused. *Held*, that the evidence was improperly admitted, under the rule that when "a claimed result becomes so remote that conclusion and deduction are necessary to connect it with a cause, the non expert witness can only state physical facts, leaving the conclusions to be drawn by the jury." This error, however, would, in this case, have been immaterial had the witness stated the facts upon which the opinion was based. *Id.*

ACCESSARY.

1. Subdivision 2 of article 87 of the Penal Code provides that "relations in the ascending or descending line by consanguinity or affinity can not be accessaries." *Gray v. State*, 611.

2. See the opinion for an indictment held sufficient to charge the accused as an accessory to murder, as accessory is defined by article 86 of the Penal Code. *Blakely v. State*, 616.

3. "An accessory is one who knowing that an offense has been committed conceals the offender or gives him any other aid in order that he may evade an arrest or trial or the execution of his sentence. But no person who aids an offender in making or preparing his defense at law, or procures him to be bailed, though he afterwards escape, shall be considered an accessory." It is not essential under this definition that the aid rendered to the criminal shall be of a character to enable the criminal to effect his personal escape or concealment, but it is sufficient if it enables him to elude present arrest and prosecution. The facts upon which the indictment in this case was based were that immediately after the commission of the homicide by the principal he and the defendant had a retired private consultation, after which the principal mounted a

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ACCESSARY—continued.

horse and disappeared, and the defendant charged the only two other witnesses present to testify on the inquest to a statement fabricated by himself, to the end that, upon final trial, the principal might be acquitted or released on nominal bond. *Held*, that such facts would constitute the defendant an accessory within the purview of the statute. *Id.*

4. That the facts above stated, if proved, would constitute the offense of subornation of perjury, would not defeat the prosecution of the accused as an accessory to murder. *Id.*

ACCOMPLICE, TESTIMONY.

See CHARGE OF THE COURT, 47, 57.

EVIDENCE, 65.

THEFT, 31, 52.

1. See the statement of the case for evidence *held* to be insufficient to support a conviction for incest, inasmuch as it rests upon the uncorroborated testimony of a witness shown by the other proof to be a *particeps criminis*. *Dodson v. State*, 514.

2. Under the rules of practice obtaining in this State, a conviction can not be had upon the testimony of an accomplice unless it be strongly corroborated by other evidence; and an accomplice can not corroborate himself nor another accomplice. Another rule is that if a witness implicates himself in the offense it is immaterial that he claims to have been coerced—no matter what his motive, if he agrees to and does participate in the offense, he is an accomplice or *particeps criminis*. *Blakely v. State*, 616.

3. The issue in this case was whether the defendant fabricated the narrative of the homicide committed by his principal, which was related upon the inquest over the deceased by the witnesses who testified against him on this trial. That issue was supported only by the uncorroborated testimony of the two witnesses who claimed that they testified to the fabricated statement upon the inquest because commanded to do so by the defendant, and because they were in fear of the defendant and his principal. *Held* that, in the absence of corroborating testimony, the evidence is insufficient to support this conviction. *Id.*

ADEQUATE CAUSE.

See CHARGE OF THE COURT, 53.

MURDER, 85.

ADULTERY.

1. It is essential to the validity of a conviction for adultery that the evidence show affirmatively that one of the parties to the adulterous acts was married and had, at the time of the alleged adultery, a spouse other than the party with whom the adultery was charged. *Webb v. State*, 164.

2. The mere opinion of witnesses that a certain woman was the wife of the male charged with the adultery is not sufficient to establish the fact of marriage. *Id.*

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ADULTERY—continued.

3. An actual living together, as man and wife, of emancipated slaves, at the time when the Constitution of 1869 took effect, would constitute a legal marriage between said parties. But note that the evidence in this case fails to establish such a living together of the accused male and his alleged wife, or that they were emancipated slaves when said Constitution took effect; wherefore the evidence is insufficient to prove the legal marriage of the accused, and therefore insufficient to support a conviction for adultery. *Id.*

4. Adultery, under the laws of this State, may be committed in either of two ways only; first, by the living together, and having carnal intercourse with each other of a man and woman, of whom either is married to some other person; or, second, by habitual carnal intercourse of such parties with each other without living together. The indictment in this case charging only the first mode of adultery, the trial court erred in charging the jury upon both modes of that offense. *Mitten and Hamilton v. State*, 846.

AGGRAVATED ASSAULT AND BATTERY.

1. See the opinion and the statement of the case for evidence adduced on a trial for assault with intent to murder held not to demand of the trial court a charge upon the law of manslaughter, or upon the law of aggravated assault. *Granger v. State*, 45.

2. The first count in the indictment in this case charged a rape upon a female over the age of ten years, and the second count charged a rape upon a female under the age of ten years. Under preponderating proof of consent and non-penetration, but conflicting proof as to the age of the female, the trial court charged the jury as follows: "But if you believe from the evidence that there was not such penetration; but that defendant made an assault upon Hattie Gray, not with intent to commit rape upon her, but with intent to have sexual intercourse with her, with her consent, then you will find the defendant guilty of an aggravated assault," etc. Held, abstractly correct, but, in view of the evidence, erroneous in that it did not direct an acquittal if the jury believed from the evidence that the female consented to the sexual act, and was over the age of ten years. *Taylor v. State*, 299.

3. Upon the issues of rape and consent the trial court charged the jury as follows: "If you believe from the evidence that the defendant did, as charged, have carnal knowledge of the said Hattie Gray, but have a reasonable doubt whether such carnal knowledge was obtained with her consent, the defendant should be acquitted unless you believe beyond a reasonable doubt that Hattie Gray was under ten years of age; in which event consent makes no difference." Held, that the charge, in view of the evidence which clearly disproved carnal knowledge, was erroneous because it rested the defendant's right to acquittal upon a hypothesis eliminated by the proof. *Id.*

4. The charge is otherwise erroneous in that, under the proof, it failed to instruct the jury in substance, that defendant should be acquitted of assault to rape or aggravated assault if the female was not under the age of ten years and consented to the act of the defendant. *Id.*

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AMENDMENT.*See JURISDICTION, 3.*

1. The rules which regulate and control the amendment of a citation and petition in a civil case apply to a *scire facias* case. Moreover, it is essential that the *scire facias*, in cases like the present, should show on its face, either by original or amended averment, that there is, in fact, no actual, though there may be an apparent, variance in the names of the parties to the bond. The trial court did not err in permitting the *scire facias* to be amended to show that the John McCulloch described therein was the W. J. McCulloch who signed as the principal in the forfeited bond. *Hutchings v. State*, 242.

2. A misstatement in an indictment as to the day on which the term of the court at which the same was presented began goes to the form and not to the substance of the indictment, and may be amended under the order of the court by merely erasing the wrong date and substituting the proper one. Moreover, such amendment is unnecessary, as the allegation of the time when the term began was mere surplusage. *Orborne v. State*, 398.

ARREST OF JUDGMENT.*See INFORMATION, 2.*

A motion in arrest of judgment is available upon any ground which would be good upon exceptions to an indictment or information for any substantial defect therein; and article 523 of the Code of Criminal Procedure enumerates the only exceptions, under our practice, to the substance of an indictment. The failure of the minutes of the court to show the appointment of the foreman of the grand jury, or that the grand jury was sworn, does not come within the enumerated defects. *McDaniel v. State*, 553.

ASSAULT AND ASSAULT AND BATTERY.*See CHARGE OF THE COURT, 34.*

1. Evidence is sufficient to support a conviction for simple assault. *Dickenson v. State*, 121.

2. To constitute an assault under the law of this State there must be the use of some unlawful violence upon the person of another, with intent to injure him or her, or some threatening gesture, showing in itself or by words accompanying it an immediate intention to commit a battery. *Carnoll v. State*, 366.

3. If a homicide be committed under the influence of sudden passion by the use of means not in their nature calculated to produce death, and in the absence of an intention to kill, the circumstances not showing an evil or cruel disposition, the party killing would not be guilty of culpable homicide, but, self defense apart, would be guilty of some grade of assault and battery. See the opinion for a discussion of the articles of the Penal Code relating to manslaughter. *Thompson v. State*, 383.

4. To constitute assault and battery, unlawful violence must be used upon another, and such violence must be used with the intent to injure the person upon whom it is inflicted. Unaccompanied by such intent,

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ASSAULT AND ASSAULT AND BATTERY—continued.

the violence, however unlawful, does not constitute assault and battery. *Ware v. State*, 522.

5. The intent to injure will be presumed when an injury has been inflicted, but when no injury has been inflicted no such presumption will obtain, and the intent must be proved. The proof in this case failing to show the infliction of an injury, and preponderating against the intent to inflict injury, the conviction is against the evidence, and the trial court erred in refusing a new trial. *Id.*

ASSAULT TO MURDER.

To constitute an assault with intent to murder, it must appear, 1, that an assault, coupled with an ability to commit a battery, was committed; and, 2, that at the time there existed in the mind of the offender a specific intent to kill. See the opinion for a state of case demanding of the trial court a charge in harmony with the rule stated, and note the statement of the case for evidence, which, however sufficient to establish an assault with intent to alarm, is insufficient to support a conviction for assault with intent to murder. *McCullough v. State*, 128.

ASSAULT TO RAPE.

Charge of the court upon a trial for assault to rape instructed the jury that "the law provides that any person shall assault a woman with the intent to commit the offense of rape, he shall be punished," etc.; the error complained of being the omission of the word "if" between the words "that" and "any." *Held*, that the omission is immaterial in view of another paragraph of the charge which properly defines the offense. *McCleaveland v. State*, 202.

2. The court charged the jury that "the use of any unlawful violence offered to another with intent to injure," etc., the objection urged being to the use of the word "offered" instead of the statutory words "upon the person," in defining assault and battery. The defenses interposed were alibi, fabricated accusation, and that the acts charged against the accused, if proved, would not show an intent on his part to rape. Whether or not the acts of the defendant constituted an assault and battery was not an issue of the case, and, under such circumstances, it is *held* that the substitution of the word "offered" for the words "upon the person" was not error to the prejudice of the accused. *Id.*

3. See the statement of the case for evidence sufficient to support a conviction for assault with intent to rape, but also for newly discovered evidence *held* to have demanded of the trial court the award of a new trial. *Id.*

4. Attempt to rape, as that offense is defined by article 535 of the Penal Code, is an offense distinct from rape or assault with intent to rape, and comprehends elements different from those which combine to constitute either of those offenses. *Melton v. State*, 284.

5. The indictment in this case charged, in the first count, an assault with intent to commit rape, and in the second count an attempt to commit rape. The State elected to prosecute upon the second count,

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ASSAULT TO RAPE—continued.

and the conviction was had under that count. One of the grounds relied upon in the motion to quash the second count was that there can be no conviction for attempt to rape except on a trial for the specific offense of rape. *Held* that the motion to quash was properly overruled, an attempt to rape being a substantive offense for which an indictment may be found and a conviction had. *Id.*

6. Assault to rape is constituted by the existence of facts which bring the offense within the definition of an assault, coupled with an intention to commit rape; and such an assault can only be committed by means of force or attempted force. *Carroll v. State*, 366.

7. See the opinion and the statement of the case for evidence *held* insufficient to support a conviction for assault with intent to commit rape, because insufficient to show the use of force or attempted force. *Id.*

ASPORTATION.

See **THEFT**, 16, 58.

ATTEMPT TO RAPE.

1. Attempt to rape, as that offense is defined by article 535 of the Penal Code, is an offense distinct from rape or assault with intent to rape, and comprehends elements different from those which combine to constitute either of those offenses. *Melton v. State*, 284.

2. The indictment in this case charged, in the first count, an assault with intent to commit rape, and in the second count an attempt to commit rape. The State elected to prosecute upon the second count, and the conviction was had under that count. One of the grounds relied upon in the motion to quash the second count was that there can be no conviction for attempt to rape except on a trial for the specific offense of rape. *Held* that the motion to quash was properly overruled, an attempt to rape being a substantive offense for which an indictment may be found and a conviction had. *Id.*

3. See the statement of the case in *Melton v. The State*, 23 Texas Court of Appeals, 204, for evidence *held* sufficient to support a conviction for attempt to rape. *Id.*

ATTEMPT TO UTTER A FORGED INSTRUMENT:

While it was competent, in a prosecution for attempting to pass a forged instrument, for the State to prove that the accused attempted to pass the same forged instrument to another than the person alleged in the indictment, and at another time and place, it was incumbent on the court to charge the jury that such evidence was admissible only upon the issue of the fraudulent intent of the accused in the transaction on trial. Omission to so charge was fundamental error. *Burks v. State*, 332.

AUTHENTICATION OF PAPERS.

When original papers are ordered sent up with the transcript, they should be forwarded with the transcript, and their identity be verified by proper certificate of the clerk, and separately from the transcript. *Carroll v. State*, 313.

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B.

BILL OF EXCEPTIONS.

See EVIDENCE, 23.
PRACTICE, 86.

EXCEPTIONS, 2, 6.
PRACTICE IN THE COURT OF APPEALS, 8.

"BODILY INFIRMITY."

Under the provisions of article 772 of the Code of Criminal Procedure, the written testimony of a witness, taken at the examining trial of the accused, can be read in evidence "when, by reason of age or bodily infirmity, such witness can not attend." Under this rule it is not essential that the bodily infirmity shall amount to a permanent disability. As a predicate for the admission of the written testimony on the examining trial, it was shown in this case that the witness was at home, in another county, forty miles distant, where, at the time of the trial, and for months before, he had been confined to his house from the effects of an attack of measles, which had destroyed one of his eyes and left him a chronic invalid, with constant pains in his head and palpitation of the heart. *Held*, that in admitting the written testimony in evidence the trial court did not err. *Collins and Lindly v. State*, 141.

BRANDS.

See MARKS AND BRANDS.

BURDEN OF PROOF.

See FORMER ACQUITTAL AND CONVICTION, 7.

1. The defense interposed to this prosecution was that the deceased fired the fatal shot and killed herself. Upon that issue the trial court charged as follows: "If, from the evidence, you believe that Anna Smith took her own life, and that the fatal shot which deprived her of life was not fired by the defendant, but by her own hand, or by any other means than the act of the defendant, then he is not guilty, and you should so find." *Held*: That the charge was erroneous because it imposed upon the accused the burden of proving his innocence. The instruction should have been to the effect that if, from all the evidence, the jury entertained a reasonable doubt whether the defendant killed the deceased, or whether the deceased killed herself, they should acquit him. *Sham-berger v. State*, 483.

2. Proof of the non-age of the accused at the time of the commission of the offense imposes upon the State the burden of proving that when he committed the offense, if he did commit it, he understood the nature and illegality of the act. This proof is not sufficiently made if the State merely shows that he knew the difference between good and evil, or that he was possessed of the intelligence of ordinary boys of his age. On the contrary, it must be affirmatively shown that he had sufficient discretion to understand the nature and illegality of the particular act constituting the crime. *Carr v. State*, 562.

BURGLARY.

1. The entry of a room or house, if made with the free consent of the proprietor or occupant, is not a burglarious entry. *Turner v. State*, 12.

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BURGLARY—continued.

2. See the opinion and the statement of the case for evidence *held* insufficient to support a conviction for burglary with intent to commit rape. *Id.*

3. The conviction in this case was for burglary. It was had under an indictment which charged conjointly the offenses of burglary and theft. The allegations were that defendant did burglariously enter the house with the intent to commit theft, and that he did commit theft of certain personal property. The indictment proceeded to allege, not the elements of the theft which it charged he *intended* to commit, but the elements of the theft which he *did* commit. The contention of the appellant is that the indictment is insufficient to support the conviction for burglary, because it failed to allege the elements of the *intended* theft. *Held*, that, alleging the elements of the theft *actually* committed, the indictment is sufficient to support the conviction for burglary. *Williams v. State*, 69.

4. If the purpose of the pleader had been merely to charge a burglary with intent to commit an offense, and not to charge burglary and the actual commission of the offense, then the indictment would be insufficient unless it alleged the elements of the intended offense. *Id.*

5. The rule is, that if burglary and theft be charged in the same count, and the party charged be convicted, the theft will be included in the burglary, and no judgment can be rendered for the theft. In such case, however, the conviction for burglary will bar a subsequent prosecution for the theft. *Id.*

6. Indictment for burglary by force, threats and fraud, although it fails to charge that the offense was committed by day or by night, will support a conviction if the proof shows that the entry was effected by actual force in the night time applied to the building. Note the approval of Carr's case, 19 Texas Court of Appeals, 635, and Martin's case, 21 Texas Court of Appeals, 1. *Buchanan v. State*, 195.

7. It is not essential that the State, on a trial for burglary, shall prove the non-consent of the owner, occupant or other authorized person to the entry. *Id.*

8. The occupancy of the owner's agent or clerk during the temporary absence of the owner is, in law, the occupation of the owner. The trial court, therefore, did not err in refusing to charge the jury to acquit if the evidence showed that the house, when entered, was in charge of one P., and not of S., the alleged owner. *Id.*

9. To constitute a nocturnal burglary, under the statutes of this State, the house must have been entered by force, threats or fraud. The indictment in this case charges that the defendant "did by force, in the night time, break and enter the house," etc. *Held*, that, to authorize a conviction, under this indictment, it devolved upon the State to prove beyond a reasonable doubt that the accused entered the house by applying actual "force" to the building. In failing to so charge the jury, and in refusing to give a special instruction in substantial compliance with the rule announced, the trial court erred. *Melton v. State*, 287.

10. There was not only a total absence of evidence on this trial tend-

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BURGLARY—continued.

ing to show an entry by breaking or by force, as alleged in the indictment, but the proof was positive that the entry was made through an open door. *Held*, insufficient to support the conviction for burglary.

11. To warrant an inference of guilt of theft from the circumstance of possession of recently stolen property, such possession must be personal and exclusive; must be unexplained, and must involve a distinct and conscious assertion of property by the defendant. See the statement of the case for evidence which, under this rule, is *held* insufficient to support a conviction for burglarious theft. *Field v. State*, 422.

C.

CARVING OFFENSES.

See FORMER ACQUITTAL AND CONVICTION, 8.

CASES DISTINGUISHED.

1. Note distinction between this and Collin's case, 16 Texas Court of Appeals, 274, upon the rule as to amendment of a *scire facias*. *Hutchings v. State*, 242.

2. Note distinction between this and Early's case, 9 Texas Court of Appeals, 484, upon the practice controlling the qualification of special judges. *Smith v. State*, 290.

CERTIFICATE OF TRANSFER.

The law does not require that, upon the transfer of an indictment from the district to the county court, the certificate of the clerk, certifying the transfer, shall recite that such indictment was signed or not signed by the foreman of the grand jury which presented it. *Robinson v. State*, 4.

CHALLENGE TO THE ARRAY AND OTHERWISE.

Under an established rule of practice in this State, no challenge to the array of jurors selected by jury commissioners can be entertained. The record in this case discloses that, at the previous term of the trial court, the term being then limited to three weeks, the court appointed jury commissioners to select jurors to serve at the ensuing term, and the said commissioners selected jurors to serve for three weeks. After the adjournment of the said previous term the Legislature enlarged the term of the trial court to four weeks; and, upon the assembling of court, the trial judge appointed commissioners to select jurors to serve at the next term, and caused them also to draw and select jurors to serve at the fourth week of the then term. It was before the jury thus selected to serve during the fourth week that the accused in this case was tried. His challenge to the array was based upon the ground that the jury was not selected by the jury commissioners appointed at the previous term of the court. *Held*, that the challenge was properly overruled. *Williams v. State*, 82.

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CHANGE OF VENUE.

See PRACTICE, 182.

1. Upon his arraignment in the criminal district court of Harris county, in which court the indictment was presented, the accused filed his statutory application for a change of venue, which the trial court awarded, and ordered the venue changed to Galveston county. The accused objected that the venue should have been changed to the district court of Fort Bend county, as the nearest to Harris county, and upon arraignment in the criminal district court of Galveston county he pleaded to the jurisdiction of said court. *Held*, that the objection was futile, and the plea to the jurisdiction was properly overruled. Note the opinion for the approval of the ruling in Bohannon's case, 14 Texas Court of Appeals, 271, to the effect that the discretion confided to district judges to change the venue of their own motion to another county within or beyond their own judicial districts is a judicial and not a personal discretion, but one that will not be revised unless it was abused to the prejudice of the accused. *Woodson v. State*, 153.

2. Change of venue was applied for by the accused upon an affidavit setting out the existence of such prejudice against him in the county of the forum as would deprive him of a fair trial. This affidavit was met by the State by affidavit impeaching the means of knowledge of the compurgators of the accused, and upon this issue the trial court permitted the State to call a witness and ask him "if there was sufficient prejudice against the accused in Tarrant county to prevent a fair trial." The defense objected to the question as not pertinent to the issue. *Held*, that the evidence indicated was admissible as bearing upon the means of knowledge of the compurgators, and the objection was properly overruled. *Henning v. State*, 315.

CHARGE OF THE COURT.

See ADULTERY, 4.

BURDEN OF PROOF.

EVIDENCE, 86, 68, 76, 82.

FORGERY, 2.

FORMER CONVICTION, 7.

MURDER, 25, 30, 35.

SWINDLING, 3.

THEFT, 39, 43, 51, 59, 60.

VERDICT, 1.

1. The duty of determining whether or not a written composition is indecent and obscene devolves upon the court and not upon the jury. The composition in this case, as set out in the indictment, and as adduced in evidence, consisted of the words, "Ass hole work." *Held*, that, in construing such composition to be obscene and indecent, and in so instructing the jury, the trial court did not err. *Smith and Coker v. State*, 1.

2. The terms "manifestly designed to corrupt the morals of youth," as used in the statute (Penal Code, art. 343), refer to the intention obtaining in the making and publication of the composition; i. e., that the design and purpose of the party making and publishing the composition was to corrupt the morals of youth. The said terms can not be construed to mean that the composition, upon its face, and of itself, must manifestly be of a kind to corrupt the morals of youth. The charge of the trial court, conforming to this construction, was correct. *Id.*

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CHARGE OF THE COURT—continued.

3. It is only when the error in the charge of the court is fundamental or when, in view of all the facts in the case, it was calculated to injure the rights of the defendant, that the charge, in the absence of a proper bill of exceptions or of a requested instruction, will be revised. *Williams v. State*, 17.

4. The objection urged to the charge in this case was that it is fundamentally defective, in that it did not explain to the jury the meaning of the word "break" as used in the statute defining the offense of breaking into a jail to rescue a prisoner—the defense contending that the definition of that term as it is used in the statute defining burglary is insufficient as applied to the offense of jail breaking; and further, that the term as used in the latter statute, not being specifically defined, it must be construed in the sense in which it is ordinarily understood in common language. *Held*, that, the evidence showing that the appellant entered the lower room of the jail by unbolting an unlocked door, and that he then forced the jailer, at the point of a pistol, to unlock the prison cages, was sufficient to prove such a breaking as is contemplated by the statute. *Id.*

5. See the opinion and the statement of the case for evidence on a murder trial, which, while it did not demand a charge upon the law of self defense, was of such character as to demand a charge upon the law of manslaughter. *Arrellano v. State*, 43.

6. See the opinion and the statement of the case for evidence adduced on a trial for assault with intent to murder *held* not to demand of the trial court a charge upon the law of manslaughter, or upon the law of aggravated assault. *Granger v. State*, 45.

7. The trial court in this case submitted to the jury the competency of the confession as evidence, and in the same connection charged them that it could be considered as evidence if the accused made statements therein relating to the commission of the offense which were otherwise found to be true. *Held*, that the charge was erroneous, because unauthorized by any evidence in the case; and that the error, though immaterial, necessitates the reversal of the judgment, inasmuch as exception was reserved at the time of the trial. *Gentry v. State*, 80.

8. The correctness of a charge of the court is to be tested by its sufficiency as a whole. Murder of the first degree was the only grade of homicide presented by the evidence in this case. It was objected that the charge, in applying the law of express malice to the facts in proof, was too general as to the design to kill, inasmuch as it did not limit it to the particular design to kill the deceased. *Held*, that, in view of the charge as a whole, the objection was hypercritical. *Heard v. State*, 108.

9. It is only when the inculpatory proof is wholly circumstantial that the trial court is required to charge the law of circumstantial evidence. *Id.*

10. See the statement of the case for evidence *held* sufficient to support a conviction for murder of the first degree. *Id.*

11. While the statute makes a recorded brand admissible as evidence

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CHARGE OF THE COURT—*continued.*

of ownership, the statute does not make it *prima facie* proof of ownership, and it can be considered only as any other evidence before the jury could be considered. To have given a requested charge upon the effect of such evidence would, therefore, have been to give a charge upon the weight of evidence, which the trial court properly refused to do. *Alexander v. State*, 126.

12. To constitute an assault with intent to murder, it must appear, 1, that an assault, coupled with an ability to commit a battery, was committed; and, 2, that at the time there existed in the mind of the offender a specific intent to kill. See the opinion for a state of case demanding of the trial court a charge in harmony with the rule stated, and note the statement of the case for evidence, which, however sufficient to establish an assault with intent to alarm, is insufficient to support a conviction for assault with intent to murder. *McCullough v. State*, 128.

13. See the opinion and the statement of the case for the circumstances under which the trial court, on a trial for murder, should have charged the jury in conformity with article 612 of the Penal Code, which declares that "the instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appears." *Nichols v. State*, 187.

14. To the rule that a confession is inadmissible if made by an accused when in arrest, unless made after warning that the same will be used as evidence against him, there is an exception when the confession comprehends a statement of facts "found to be true, and which conduce to establish his guilt." Inasmuch as the confession of Lindly, which was made during his confinement in jail, and in the absence of Collins, though made without warning, comprehended a statement of facts found to be true, and which conduced to the establishment of guilt, it was, upon the joint trial of Collins and Lindly, admissible as against Lindly, but not as against Collins. The trial court, however, instructed the jury that the confessions could not be considered as evidence against Collins; wherefore it is held that the action of the court upon the question raised on the confession was correct. *Collins and Lindly v. State*, 141.

15. In order to constitute the accused a principal in the crime of theft, it devolves upon the State to establish his complicity in the original taking. In view of the evidence in this case, and of the refusal of a charge based upon it, the failure of the trial court to apply this doctrine to the case, in so far as it concerned the defendant Lindly, was error. *Id.*

16. The trial court having admitted in evidence the indictment against C. for burglary, and the judgment rendered upon that trial, should, in the charge to the jury, have limited and restricted the jury to the legitimate purpose of such testimony. This omission in the charge was fatal error. *Littlefield v. State*, 167.

17. The prosecution in this case was for perjury, alleged to have been committed by the accused when he testified at the trial of one Williams

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CHARGE OF THE COURT—continued.

for assault to murder. Upon the introduction of one Moore as a witness for the defense, in the present case, the State offered, and was permitted, over the defendant's objection, to read in evidence an indictment then pending against the said Moore, wherein the said Moore was charged with perjury upon the same trial as that in which the defendant is charged to have committed perjury. *Held* that, though the indictment was not admissible to impeach Moore's competency as a witness, it was admissible as matter going directly to his credibility, and as tending to show a motive for his testimony in this particular case. Being admissible for these purposes, it was not incumbent on the trial judge, in his charge, to limit and restrict it, inasmuch as it did not tend to exercise a wrong, undue or improper influence upon the jury as to the main issue. *Brown v. State*, 170.

18. Upon the issue of insanity interposed as a defense to a prosecution for murder, the trial court, after having instructed the jury that every man is supposed to be sane and responsible for his acts, until the contrary is shown to the satisfaction of the jury, instructed them in a subsequent paragraph that the burden of proof was upon the defendant to establish his insanity. The objection urged is that the paragraphs referred to make the presumption of sanity, and the burden of proving insanity too prominent. *Held*, that the objection is without merit, in view of the entire charge. *Massingale v. State*, 181.

19. The occupancy of the owner's agent or clerk during the temporary absence of the owner is, in law, the occupation of the owner. The trial court, therefore, did not err in refusing to charge the jury to acquit if the evidence showed that the house, when entered, was in charge of one P., and not of S., the alleged owner. *Id.*

20. Charge of the court upon a trial for assault to rape instructed the jury that "the law provides that any person shall assault a woman with the intent to commit the offense of rape, he shall be punished," etc.; the error complained of being the omission of the word "if" between the words "that" and "any." *Held*, that the omission is immaterial in view of another paragraph of the charge which properly defines the offense. *McCleaveland v. State*, 303.

21. The court charged the jury that "the use of any unlawful violence offered to another with intent to injure," etc., the objection urged being to the use of the word "offered" instead of the statutory words "upon the person," in defining assault and battery. The defenses interposed were alibi, fabricated accusation, and that the acts charged against the accused, if proved, would not show an intent on his part to rape. Whether or not the acts of the defendant constituted an assault and battery was not an issue of the case, and, under such circumstances, it is *held* that the substitution of the word "offered" for the words "upon the person" was not error to the prejudice of the accused. *Id.*

22. However erroneous a charge of the court may be, if it redound to the benefit of the accused he can not be heard to complain. *Id.*

23. Intent is a condition of the mind which may be evidenced by outward acts or words spoken. The evidence in this case shows that after

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CHARGE OF THE COURT—continued.

the apparent abandonment of the dispute, and after the deceased had put away his pistol, and started to leave, but before he actually left the ground, the accused, displaying his pistol, said: "We had as well settle this thing now," and almost immediately fired upon deceased. The defense claims that, in charging upon the legal consequences of the renewal of the difficulty by the accused, the court erred in failing to instruct the jury that they might inquire into the intent of the accused in renewing it. *Held*, that the proof in question manifested the intent, and was undisputed; wherefore there was no issue requiring such an instruction. *Allen v. State*, 216.

24. Note the opinion for a state of proof under which, in charging the jury upon the right of the accused to act upon the appearance of danger, the trial court did not err in instructing only upon the appearance of *real* danger. *Id.*

25. Felonious intent is the essential ingredient of theft, and, to constitute that offense, the taking must, in the first instance, have been fraudulent, and if the possession be obtained lawfully, no subsequent appropriation, however fraudulent the intent, will suffice to constitute the taking theft, unless such lawful possession was obtained by means of false pretext, or with the fraudulent intent, at the very time of the taking, to deprive the owner of the value of the property and appropriate the same to the use and benefit of the taker. See the opinion for a requested charge, which, harmonizing with this doctrine, was, in view of the facts in proof, erroneously refused. *Guest v. State*, 235.

26. Note a case in which the trial court should have given in charge to the jury the established doctrine, that, "in cases where there is evidence from which the jury might infer that the taking was not fraudulent, it is the right of the defendant to have them clearly instructed as to the distinction between trespass and theft." *Id.*

27. The evidence on a murder trial disclosed that for a period long anterior to the homicide the deceased was at enmity with the accused; that he had repeatedly, without apparent, probable or reasonable cause, charged the accused with a felony; that he had threatened to kill the accused; that he had conspired with one T. to kill the accused, and that, at the time of the homicide, he was acting together with T. in pursuance and furtherance of said conspiracy; that he and T. made an unsuccessful attempt on the night before the homicide to induce other parties to co-operate with them in the murder of the accused on that night, of which effort on the part of the deceased and T. the accused, on the same night, was informed; that on the next morning, immediately after a conference with T., the deceased, armed with a pistol, accosted the accused and again charged him with the felony; that the accused thereupon demanded that the charge be retracted by the deceased, when the deceased placed his right hand to his right side (where his pistol was afterward found), and the accused fired the fatal shot. *Held*, that the evidence fairly raised the issue of self defense, and authorized the court to charge the jury upon that issue; but that, as there was no evidence tending to show that the accused had forfeited his right of

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self defense by seeking and provoking the difficulty, the charge upon that issue was not authorized by the proof, was prejudicial to the accused, and was, therefore, erroneous. *Tillery v. State*, 251.

28. The rule prescribing the extent to which a person in emergency is authorized to act upon appearances of danger is as follows: If, from the standpoint of the slayer, it reasonably appeared to him, from the circumstances of the case, that the danger existed, and he acted under the reasonable belief that it did exist, he was justified in defending against it to the same extent, and under the same rules, as if the danger had been real. The charge in this case was erroneous, in that it limited such right of the accused to his *honest belief* that he was in danger, and erroneously made this idea prominent by reiteration. *Id.*

29. The charge of the court is otherwise erroneous in that the instruction relating to the threats uttered by the deceased against the accused is disconnected from that portion of the charge which relates to self defense, whereas it should have formed a part of the instruction on the law of self defense, and should have been given in immediate connection with that issue. *Id.*

30. See the opinion and the statement of the case for evidence on a murder trial *held* not to raise the issue either of manslaughter or of self defense; wherefore the trial court properly refused to instruct the jury upon those questions. *Brooks v. State*, 274.

31. To constitute a nocturnal burglary, under the statutes of this State, the house must have been entered by force, threats or fraud. The indictment in this case charges that the defendant "did by force, in the night time, break and enter the house," etc. *Held*, that, to authorize a conviction, under this indictment, it devolved upon the State to prove beyond a reasonable doubt that the accused entered the house by applying actual "force" to the building. In failing to so charge the jury, and in refusing to give a special instruction in substantial compliance with the rule announced, the trial court erred. *Melton v. State*, 287.

32. The first count in the indictment in this case charged a rape upon a female over the age of ten years, and the second count charged a rape upon a female under the age of ten years. Under preponderating proof of consent and non-penetration, but conflicting proof as to the age of the female, the trial court charged the jury as follows: "But if you believe from the evidence that there was not such penetration; but that defendant made an assault upon Hattie Gray, not with intent to commit rape upon her, but with intent to have sexual intercourse with her, with her consent, then you will find the defendant guilty of an aggravated assault," etc. *Held*, abstractly correct, but, in view of the evidence, erroneous in that it did not direct an acquittal if the jury believed from the evidence that the female consented to the sexual act, and was over the age of ten years. *Taylor v. State*, 299.

33. Upon the issues of rape and consent the trial court charged the jury as follows: "If you believe from the evidence that the defendant did, as charged, have carnal knowledge of the said Hattie Gray, but have a reasonable doubt whether such carnal knowledge was ob-

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tained with her consent, the defendant should be acquitted unless you believe beyond a reasonable doubt that Hattie Gray was under ten years of age; in which event consent makes no difference." *Held*, that the charge, in view of the evidence which clearly disproved carnal knowledge, was erroneous because it rested the defendant's right to acquittal upon a hypothesis eliminated by the proof. *Id.*

34. The charge is otherwise erroneous in that, under the proof, it failed to instruct the jury in substance, that defendant should be acquitted of assault to rape or aggravated assault if the female was not under the age of ten years and consented to the act of the defendant. *Id.*

35. The evidence presenting only the conflicting theories of murder of the first degree on the one hand, and perfect self defense on the other, the trial judge correctly confined his charge to those two issues, and properly refrained from charging upon murder of the second degree and manslaughter. See the statement of the case for evidence held sufficient to support a conviction for murder of the first degree. *Henning v. State*, 315.

36. While it was competent, in a prosecution for attempting to pass a forged instrument, for the State to prove that the accused attempted to pass the same forged instrument to another than the person alleged in the indictment, and at another time and place, it was incumbent on the court to charge the jury that such evidence was admissible only upon the issue of the fraudulent intent of the accused in the transaction on trial. Omission to so charge was fundamental error. *Burks v. State*, 332.

37. The evidence in this case showed that the house in which the playing was done was a private residence, but that it had been frequently resorted to for the purpose of gaming. Under this evidence, the trial court instructed the jury that, if the said house was "used commonly and exclusively for the purpose of gaming, defendant would be guilty, even though the house was a private residence." *Held*, that the instruction was erroneous; and that, as the evidence shows that the house was a private residence, it does not support the conviction. *Borders v. State*, 333.

38. The evidence in this case tending to support the defense that the accused killed the alleged stolen animal by direction of his employer, the charge of the court was erroneous in not instructing the jury that if they believed that the accused took the said animal by direction of his employer, for the use and benefit of his employer, believing at the time that his said employer owned or had a right to appropriate the animal, then the accused would not be guilty of theft, because of the absence of the fraudulent intent. *Myers v. State*, 334.

39. Evidence which tended to show that the purported drawer of the alleged forged instrument authorized the accused to write and sign it demanded an affirmative charge to the effect that if the jury believed such to be the fact, or had a reasonable doubt on the question, they should acquit. *Williams v. State*, 343.

40. Purchase of the animal was the defense interposed to the prosecu-

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tion for the theft of the same, and, the defendant having produced evidence tending to establish that defense, he was entitled to an affirmative charge instructing the jury to the effect that if they believed from the evidence that the defendant purchased the animal, or if, from the evidence as to the purchase, they entertained a reasonable doubt that he stole the animal, they must acquit him of the charge of theft. The refusal of a special charge embodying the rule as stated was error. *Roy v. State*, 369.

41. The proof in this case raising the questions whether or not the accused intended to kill the deceased, and whether or not the means used were in their nature calculated to produce death, the trial court should have given to the jury instructions appropriate to those issues. *Thompson v. State*, 388.

42. If the evidence on a trial for murder raises the issue of self defense, the accused is entitled to a charge upon that issue direct and affirmative in character. See the statement of the case for a charge upon self defense held insufficient because negative. *Id.*

43. With respect to the presumption arising from the possession of recently stolen property, the trial court charged the jury as follows: "If a person is found in possession of property recently stolen, and if the circumstances are such as call upon him for an explanation, and he fails to give any explanation of such possession, then these facts would authorize his conviction, if a presumption of guilt has arisen in the minds of the jury from such facts." Held erroneous, as being a charge upon the weight of evidence. See the opinion *in extenso* for the correct rule upon the subject. *Stockman v. State*, 387.

44. Possession of stolen property, whether recent or remote, is a circumstance admissible in evidence, to be considered by the jury in connection with the other proof in the case. But to warrant the inference of guilt from the possession alone, the possession must be a personal one; must be recent and unexplained, and must involve a distinct and conscious assertion of claim by the possessor. Note the opinion for a state of proof to which this rule applies; wherefore, in refusing a special charge in harmony with the principle, the trial court erred. *Moreno v. State*, 401.

45. But note that, in this case, even had the charge been given, the evidence would not support a conviction, because recent possession alone, without an opportunity to explain, will not authorize a verdict of guilty. Had the special charge been given, the evidence would still have demanded the award of a new trial. *Id.*

46. The *factum probandum* of theft, as that offense is defined by our statute, is the *taking* of the property. If the *taking*, being the main fact in issue, is not directly attested by an eye witness, but is proved as a matter of inference from other facts in evidence, the case rests wholly upon circumstantial evidence, and the failure of the trial court to give in charge to the jury the law of circumstantial evidence is material error. *Crowell v. State*, 404.

47. The *corpus delicti* of theft can not be established by the uncorroborated testimony of an accomplice, but upon that issue the accomplice

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must be corroborated by other evidence tending to show the commission of the offense, and the defendant's connection with the commission of the same. It will not suffice to corroborate such testimony only to the extent of connecting the defendant with the commission of an act alleged to be an offense. In this case the ownership of an animal alleged in the indictment was proved only by the uncorroborated testimony of the accomplice. *Held*, insufficient on the issue of ownership, and, therefore, insufficient to support the conviction. *Id.*

48. See the statement of the case for a charge of the court upon accomplice testimony *held* erroneous, because it applies the law too broadly to the facts of the case, and does not, as it should, require the corroboration of the accomplice to be as to facts tending to show the commission of an offense, and the defendant's connection with such commission. *Id.*

49. The charge in this case is otherwise erroneous in that it instructs the jury that the *killing* of the animal constituted the offense, whereas, the *taking* (if any) of the animal constituted the offense. Moreover, the facts demanded that the charge should submit to the jury whether the witness M. was an accomplice, and in omitting to do so, and in refusing the defendant's requested instruction upon the subject, the trial court erred. *Id.*

50. Charge of the court instructed the jury to "find the defendant guilty if he and Homer Smith were acting together fraudulently, and the horses were taken by either of them." *Held*, erroneous. The charge should have been to the effect that, to constitute the defendant a principal in the theft, he must have taken the horses himself, or must have acted together with Homer Smith in committing the theft, knowing at the time the fraudulent intent of said Smith, and, if not present with Smith at the time of the commission of the theft by said Smith, must have been acting with him at the very time of the commission of said theft in pursuance of a common design existing between them to commit the theft. *Gentry v. State*, 478.

51. It devolves upon the State, in a prosecution for theft, to prove the name of the owner of the alleged stolen property as it is alleged in the indictment. The given name may be alleged by initials; and, though a variance between the middle initial as alleged and as proved will be immaterial, a variance as to the first initial letter of the given name will be fatal, unless it be proved that the owner was known as well by the name alleged as by the name proved. The indictment alleged the name of the owner in this case to be N. J. S., and the proof showed the name to be M. J. S. The trial court charged, in substance, that if the jury believed M. J. S. to be the person named in the indictment as N. J. S., the proof of ownership would be sufficient. *Held*, erroneous. *Willis v. State*, 487.

52. In regulating the right to take life in necessary self defense, the code of this State establishes an essential distinction, based upon the nature and severity of the unlawful attack, and discriminates it into two classes. The first class, regulated by article 570 of the Penal Code, com-

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prises all cases in which, from the acts of the assailant or his words coupled therewith, it is reasonably apparent that his intent is to murder or do serious bodily harm, in which case the assaulted party may lawfully slay his aggressor while he is committing the offense, or when he has done some act evidently showing his intention to commit it. The second class, regulated by article 572 of the Penal Code, comprises those cases in which the purpose or intent reasonably indicated by the unlawful and violent attack is other than those above mentioned. The proof on this, as on the former trial of this case, shows that, if the deceased made any attack on the accused, it was a murderous attack which came clearly within the provisions of article 570 of the Penal Code, and there was no evidence whatever tending to show a milder attack. In this state of the proof, the trial court erred in charging the provisions of article 572, because such charge, being unauthorized by the proof, was calculated to confuse and mislead the jury. Note the opinion for the approval on the subject of Orman's case, 22 Texas Court of Appeals, 604, and Kendall's case, 8 Texas Court of Appeals, 569. *Orman v. State*, 495.

53. Any condition or circumstance which is capable of creating sudden passion, rendering the mind incapable of cool reflection, may be "adequate cause," and where the evidence shows a number of conditions or circumstances tending either singly or collectively to show "adequate cause," the jury should not be restricted by the charge to a consideration of a single condition or circumstance, but should be directed to consider them all in determining the question of "adequate cause." The proof in this case shows (besides insulting language used by the deceased about the mother and sister of the defendant) that the deceased, for several hours preceding the killing, was searching for the defendant with the avowed intention of killing him on sight, and that he was armed with a pistol with which he declared his intention to kill the defendant. *Held*: That, in confining the "adequate cause" to the insulting language, and in failing to submit to the jury whether the said acts and threats of the deceased (which were proved to have been communicated to the defendant), of themselves, or in connection with the insulting language, were not "adequate cause," the charge of the court on the issue of manslaughter was erroneous. *Id.*

54. See the statement of the case for a charge of the court on the principle of "cooling time," *held*, erroneous because not authorized by the proof. *Id.*

55. When, as in this case, the evidence on a trial for theft tends to show a voluntary return of the stolen property by the accused to the owner, within a reasonable time, and before prosecution has been instituted, it devolves upon the trial court to charge the jury upon the law applicable to such defense. See the statement of the case in *Guest v. The State*, ante, page 235, for evidence *held* to raise the issue of a voluntary return of the alleged stolen property, within the statutory meaning of that defense. *Guest v. State*, 530.

56. See the statement of the case in *Guest v. The State*, ante, page 235,

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for a state of proof under which the trial court should have instructed the jury with reference to the law applicable to a defendant's explanation of his possession of stolen property, made when his possession was first challenged. In refusing the special charge upon the subject requested by the accused, the trial court erred. *Id.*

57 With respect to the testimony of a State's witness, the trial court charged the jury as follows: "In contemplation of our law with reference to accomplice testimony, the court charges you that John Thomas, the witness introduced by the State, is an accomplice with the defendant," etc. *Held:* Error, because the said charge was tantamount to an instruction to the jury that defendant was guilty as well as Thomas. The charge should have instructed the jury that the witness Thomas was an accomplice in the commission of the offense, and that the defendant could not be convicted upon the testimony of Thomas unless it was legally corroborated. *Spears v. State*, 537.

58. A *willful* act is one committed with an evil intent, with legal malice, without reasonable ground for believing the act to be lawful, and without legal justification. A *malicious* act is one committed in a state of mind which shows a heart regardless of social duty, and fatally bent on mischief, a wrongful act, intentionally done without legal justification or excuse. In all trials for maiming, the legal signification of the terms "willfully" and "maliciously" must be explained to the jury by the charge of the court. *Bowers v. State*, 542.

59. However improbable may be the evidence in support of a defense, it is the duty of the trial court to submit the issue to the jury under proper instructions. A defense witness in this case testified that he was present and witnessed the defendant's purchase of the alleged stolen animal. *Held*, that in failing to submit the question of a purchase *vel non* to the jury, the charge of the court was erroneous. *McDaniel v. State*, 552.

60. It is not necessary that the proof of discretion should be made by positive evidence. In many cases, circumstances of education, habits of life, general character, moral and religious training, and, oftentimes, the circumstances connected with the offense will be sufficient to satisfy the jury that the accused had the discretion required to render him responsible for the crime. *Carr v. State*, 562.

61. One of the exceptions to the general rule that a witness can speak only as to facts, and will not be permitted to express his belief or opinion, is that, when the issue is as to the sanity of a person, even the non-expert witness may state his opinion and conclusion upon the facts to which he has testified. This rule will comprehend the inquiry as to whether or not, on account of non-age, the accused had sufficient discretion to understand the nature and illegality of the acts constituting the crime charged against him; and the witness, having stated the facts upon which he based his opinion, may state his opinion as to the discretion of the accused. *Id.*

62. The refusal by the trial court to give a requested instruction in charge to the jury is not error if the general charge comprehended clearly the law applicable to the case. *Id.*

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63. It is not incumbent upon the trial court to give in charge to the jury the law applicable to circumstantial evidence, unless the State, in seeking a conviction, relies wholly upon that character of evidence. Note that this rule, in view of the confession of the accused, applies to this case. *Id.*

64. The credibility of the witnesses and the weight of the evidence are questions addressed to the trial jury alone. In passing upon the truth of a confession, a part of which has been contradicted by other evidence, it is within the power of the jury to accept one portion of the confession as true, and to reject as untrue that which has been contradicted by other testimony. *Id.*

65. Upon a trial for theft—possession of the stolen property being the inculpatory fact—the State was correctly permitted to prove the defendant's contemporaneous possession of other stolen animals than that described in the indictment; such proof being admissible upon the question of identity in developing the *res gestæ*, or to prove by the circumstances the theft on trial, or the intent of the accused with respect to the animal named in the indictment. But, in failing to limit such proof to such purpose, the charge was materially defective. *Willis v. State*, 584.

66. An essential element of the crime of theft is that the property was taken by the accused with intent to appropriate the same to his own use and benefit. In the general charge in this case, this element, in the application of the law to the facts, was omitted. *Held:* That, in view of the proof on the trial, the omission was error. *Id.*

67. The defense requested a special charge, as follows: "If Boyd bought the cow from Mixon, whether in good or bad faith, and defendant's connection with the cow was only to aid in disposing of said cow—in other words, if said cow was stolen by some one else than defendant, and sold to Boyd—then defendant's subsequent connection with the cow would not be theft, and, if you so find, you will acquit the defendant." *Held:* That, in view of the evidence on the trial, the refusal of the special charge was error. *Id.*

68. The inculpatory fact relied upon in this case was the recent possession of the alleged stolen property by the defendant. The question raised by the proof was whether or not the facts established a case of recent possession. In failing to give in charge to the jury proper instructions as to the law applicable to such possession, the trial court erred. *Willis and Boyd v. State*, 587.

69. The defendant Willis requested the court to specially charge the jury as follows: "Should you believe from the evidence that defendant W. E. Willis simply stayed, or went home, if Boyd's house was his home, and was requested to assist in branding said cattle, without a previous agreement or participation in the offense charged, you will acquit him." *Held:* that, in view of the evidence tending to support this defense, the refusal of this special instruction was error. *Id.*

70. See the statement of the case for evidence on a trial for horse theft, which, being wholly circumstantial, is *held* to have demanded from the

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trial court a charge upon the law applicable to circumstantial evidence. *Fuller v. State*, 596.

71. See the statement of the case for evidence on a trial for horse theft which, being wholly circumstantial, is held to have demanded of the trial court a charge upon circumstantial evidence. *Guajardo v. State*, 608.

72. See the opinion in extenso, and the statement of the case for proof developed on a trial for horse theft, which, raising the defense of mistake of fact on the part of the accused in asserting claim to the animal alleged to have been stolen, demanded of the trial court the submission of that issue to the jury under proper instructions. Note also that, in view of the proof, the trial court having refused the accused a continuance, should have awarded him a new trial. *Criswell v. State*, 606.

73. Among the well established rules which, under our practice, apply to the charge of the court, are the following: 1. The charge of the court is always sufficient if it distinctly sets forth the law applicable to the evidence; and it is only necessary to give such instructions as are applicable to every legitimate deduction to be drawn from the facts in proof. 2. The charge must be tested by the evidence. 3. If, in homicide cases, the issue of self defense is not *fairly* raised by the evidence, no charge upon that issue should be given. 4. In the absence of evidence tending to establish, or to raise a doubt, as to whether the homicide be of a lower grade than murder, it is unnecessary and improper for the court to charge upon manslaughter. *Thumm v. State*, 667.

74. The perjury assigned in this case was the alleged false testimony given by the accused upon the trial, in a justice's court, of one Green Wright, upon a charge of carrying a pistol. The prosecution against Wright was based upon a complaint and information, the former of which is required by law to be verified by the oath of some credible person. Evidence was introduced upon this trial which tended strongly to show that the complaint under which the prosecution of Wright was had was not sworn to; and upon the theory that, if the complaint was not sworn to, the jurisdiction of the justice of the peace had not attached in the Wright case, a false statement by accused in that proceeding was not assignable as perjury, the accused asked the trial court to charge the jury that if they had a reasonable doubt that the complaint was sworn to, they should acquit. *Held* that, under the rule first announced, the trial court did not err in refusing the special charge. *Anderson v. State*, 705.

CIRCUMSTANTIAL EVIDENCE.

See CHARGE OF THE COURT, 9, 46,
60, 63, 70, 71.
EVIDENCE, 69, 73.

MURDER, 7.
THEFT, 80, 48, 61, 62.

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COMPLAINT.

The constitutional and statutory provisions which require that all prosecutions in this State, whether by information or indictment, shall be carried on "in the name and by the authority of the State of Texas," necessitate that it so appear from the information or indictment, but do not in misdemeanor cases require that it shall so appear from the complaint. The trial court did not, therefore, err in this case in overruling a motion in arrest of judgment based upon the insufficiency of the complaint because it does not begin with the words: "In the name and by the authority of the State of Texas." *Jefferson v. State*, 535.

CONFESSIONS.

See EVIDENCE, 71.

FORGERY, 5.

1. To render a confession inadmissible upon the ground that it was induced by the promise of some benefit to the accused, such promise must be positive, and must be made or sanctioned by some one in authority, and be of such character as would be likely to influence the accused to speak untruthfully. The confession of an accused is not rendered inadmissible because it was made under the influence alone of fear of legal punishment. *Gentry v. State*, 80.

2. The trial court in this case submitted to the jury the competency of the confession as evidence, and in the same connection charged them that it could be considered as evidence if the accused made statements therein relating to the commission of the offense which were otherwise found to be true. *Held*, that the charge was erroneous, because unauthorized by any evidence in the case; and that the error, though immaterial, necessitates the reversal of the judgment, inasmuch as exception was reserved at the time of the trial. *Id.*

3. To the rule that a confession is inadmissible if made by an accused when in arrest, unless made after warning that the same will be used as evidence against him, there is an exception when the confession comprehends a statement of facts "found to be true, and which conduce to establish his guilt." Inasmuch as the confession of Lindly, which was made during his confinement in jail, and in the absence of Collins, though made without warning, comprehended a statement of facts found to be true, and which conduced to the establishment of guilt, it was, upon the joint trial of Collins and Lindly, admissible as against Lindly, but not as against Collins. The trial court, however, instructed the jury that the confessions could not be considered as evidence against Collins; wherefore it is *held* that the action of the court upon the question raised on the confession was correct. *Collins and Lindly v. State*, 141.

CONSPIRACY.

See EVIDENCE, 2, 64.

PRACTICE, 4.**THEFT**, 42.

The general rule obtains in this State that each conspirator is responsible for everything done by his confederates which follows imme-

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CONSPIRACY—continued.

diately in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. In other words, the act must be the ordinary and probable effect of the wrongful act specifically agreed upon, so that the connection between them may be reasonably apparent, and must not be a fresh and independent product of the mind of one of the confederates, outside of, or foreign to, the common design. Whether or not the act was the ordinary and probable effect of the common design or conspiracy, or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, are questions which, under proper instructions, should be submitted to the jury for solution. *Bowers v. State*, 553.

CONSPIRACY TO COMMIT BURGLARY.

Conspiracy to commit burglary is a distinct offense created by the statutes of this State, and it is complete when two or more persons have positively agreed between themselves to commit burglary, though the burglary be never committed. If a burglary and a conspiracy to commit burglary involve the same transaction, the two offenses of burglary and conspiracy to commit burglary may be carved out of the same transaction, and a conviction for the one will not bar a prosecution for the other. See the opinion in extenso for an exhaustive discussion of the doctrine. *Whitford v. State*, 480.

CONSTRUCTION.

See MURDER, 26.

WRITTEN INSTRUMENTS.

CONSTRUCTIVE POSSESSION.

See POSSESSION, 2.

CONTINUANCE.

See CHARGE OF THE COURT, 73.

1. The action of the trial court in refusing an application for continuance will not be revised unless exception to such action is presented by proper bill. *Williams v. State*, 33.

2. Continuance to secure absent testimony is properly refused if, in view of the evidence adduced on the trial, the absent testimony appears not to be probably true. *Melton v. State*, 47.

3. Continuance to secure absent testimony is properly refused if, in view of the evidence on the trial, the absent testimony was not probably true, or, if not probably untrue, it was, in the light of the other evidence, immaterial to any issue in the case. *Parker v. State*, 61.

4. Sub-division 6 of article 560 of the Code of Criminal Procedure provides that though a continuance shall not be granted as a matter of right, still, if the application therefor be overruled and the defendant be convicted, a new trial should be granted, if it appears upon the trial that the evidence of the absent witnesses was material, and that

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CONTINUANCE—continued.

the facts set forth in the application were probably true. *McAdams v. State*, 86.

5. The rule which should govern the action of the trial court in passing, first, upon an application for a continuance, and subsequently upon a motion for new trial, has heretofore been stated by this court as follows: "If there is such conflict between the inculpatory facts and those set forth in the application as to render it improbable that the facts stated in the application are material and probably true, the continuance should be refused; and hence, a new trial based thereupon should also be refused. There must, however, not only be such a conflict, but the inculpatory facts must be so strong and convincing as to render the truth of the facts set forth in the application improbable." See the opinion for the substance of evidence set forth in an application for a continuance, which, the continuance being refused, demanded of the trial court, in view of the evidence on the trial, the award of a new trial. *Id.*

6. An accused, resting his demand for a new trial upon disputed facts, is not entitled to a new trial in order to produce testimony that is cumulative of his evidence on the trial, but the doctrine of cumulative facts does not apply to applications for continuance. But note that the facts set out in the application for continuance in this case are not merely cumulative. *Id.*

7. However complete may be the diligence used to secure the presence of absent witnesses, as shown by application for continuance, the refusal of the continuance is not ground for new trial if the absent testimony in the light of the evidence adduced on the trial is not probably true. *Collins and Lindly v. State*, 141.

8. The ruling of the trial court refusing a continuance will not be revised by this court unless, in addition to its other requisites, the application shows the relevancy and materiality of the absent testimony. *Brooks v. State*, 274.

9. Proof of deadly threats made by the deceased against the accused, and that the deceased was a violent and dangerous character, and that the threats and the character of the deceased were known to the accused at the time of the homicide, can afford no justification for homicide without proof that, at the time of the homicide, the deceased did some act indicating a present intention to kill the accused or do him serious bodily harm. Neither the evidence adduced on the trial nor that foreshadowed in the application for continuance laid a predicate for proof of threats in this case; wherefore a continuance was properly refused. *Id.*

10. Continuance is properly refused if, in view of the evidence on the trial, the absent testimony as disclosed in the application is either immaterial or is probably untrue. Note the statement of the case for such testimony set forth in an application for a continuance. *Hemming v. State*, 315.

11. Absence of one of defendant's attorneys from the court when the case is called for trial will not entitle him to a continuance, when it appears that he is represented by other counsel and that no one of his rights is jeopardized. *Stockholm v. State*, 598.

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"COOLING TIME "

See MURDER, 83.

CORPORATIONS.

1. Information or indictment for theft of the property of a corporation must not only describe the corporation by its correct corporate name, but should allege that it was a corporation. Allegation that the "Mo. P. Rway Company" was the owner of the stolen property will not suffice. See the opinion in extenso for a discussion of the question, and for the substance of an information *held* insufficient to charge the offense of theft. *White v. State*, 281.

CORPUS DELICTI.

See CHARGE OF THE COURT, 47.

THEFT, 81.

1. The corpus delicti being the issue under immediate inquiry, the State was permitted to ask its medical witness how, in his opinion, based upon the examination of the body, the injuries thereon were inflicted. The defense objected that the question called for the mere conclusion of the witness as an individual, and not for his opinion as an expert, and that it involved matter upon which the jury were as competent to form an opinion as the witness. The objection was overruled, and the witness was permitted to state his opinion as an individual as to "the only way he could imagine the peculiar injuries were inflicted." *Held*, that the objection should have been sustained, but that, in view of the other evidence in the case, the question and answer prejudiced no right of the accused; wherefore the error was immaterial. *Steagald v. State*, 207.

COURT OF APPEALS.

See JURISDICTION, 4.

CREDIBILITY OF WITNESSES.

See WITNESSES, 8.

CUMULATIVE EVIDENCE.

See NEW TRIAL, 8.

D.**DEADLY WEAPON.**

See MURDER, 9.

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See EVIDENCE, 2.
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DEFINITIONS.

See "BODILY INFIRMITY."

INFORMATIONS, 1.

1. A *willful* act is one committed with an evil intent, with legal malice, without reasonable ground for believing the act to be lawful, and without legal justification. A *malicious* act is one committed in a state of mind which shows a heart regardless of social duty and fatally bent on mischief; a *wrongful* act, intentionally done without legal justification or excuse. In all trials for maiming, the legal signification of the terms "willfully" and "maliciously" must be explained to the jury by the charge of the court. *Bowers v. State*, 542.

8. "An accessory is one who knowing that an offense has been committed conceals the offender or gives him any other aid in order that he may evade an arrest or trial or the execution of his sentence. But no person who aids an offender in making or preparing his defense at law, or procures him to be bailed, though he afterwards escape, shall be considered an accessory." It is not essential under this definition that the aid rendered to the criminal shall be of a character to enable the criminal to effect his personal escape or concealment, but it is sufficient if it enables him to elude present arrest and prosecution. The facts upon which the indictment in this case was based were that immediately after the commission of the homicide by the principal he and the defendant had a retired private consultation, after which the principal mounted a horse and disappeared, and the defendant charged the only two other witnesses present to testify on the inquest to a statement fabricated by himself, to the end that, upon final trial, the principal might be acquitted or released on nominal bond. *Held*, that such facts would constitute the defendant an accessory within the purview of the statute. *Blakely v. State*, 616.

E.

ENTRY.

The entry of a room or house, if made with the free consent of the proprietor or occupant, is not a burglarious entry. *Turner v. State*, 12.

EMBEZZLEMENT.

1. A conviction for embezzlement can not be had on an indictment for theft. *Lott v. State*, 728.

EVIDENCE.

See ASSAULT AND BATTERY, 5.

BURGLARY, 2.

CHARGE OF THE COURT, 65, 69, 72.

CONFESSIONS, 8.

FACT CASES, 25.

FORMER ACQUITTAL AND CONVICTION, 5.

1. See the statement of the case for evidence *held* sufficient to support a conviction for indecent publication. *Smith and Coker v. State*, 1.

2. See the opinion for evidence *held* to have been properly admitted

HABEAS CORPUS, 1.

MURDER, 24.

NEW TRIAL, 5.

POSSESSION OF RECENTLY STOLEN PROPERTY, 1.

PRACTICE, 85, 86, 87.

THEFT, 8, 30, 40, 41, 44, 45, 47, 48, 58, 59, 60.

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under the rule that, a conspiracy having been established, the acts and declarations of one conspirator pending the conspiracy, and in furtherance of the criminal design, are admissible against all of the conspirators, and note the statement of the case for evidence *held* sufficient to support a conviction for breaking into a jail to rescue a prisoner. *Williams v. State*, 17.

8. An inquiry as to character must be limited to the general reputation of the person impugned in the community of his residence or where he is best known, and the witness must speak from his knowledge of that general reputation, and not from his own individual opinion. If the defendant voluntarily puts his character in issue, the prosecution is entitled to rebutting evidence if it can produce it, but such evidence must be confined to the general reputation of the defendant, and can not be extended to particular acts. There is no rule of law which will permit an inquiry into the character of the defendant's associates, and in permitting such inquiry in this case the trial court erred. *Holsey v. State*, 85.

4. Fraudulent intent in the taking of the alleged stolen property must be shown in order to authorize a conviction for theft, and it devolves upon the trial court to so instruct the jury affirmatively and directly. *Id.*

5. See the statement of the case for evidence *held* sufficient as a predicate for the admission of the written testimony of an absent witness. *Parker v. State*, 61.

6. See the statement of the case in this and in Melton's case, ante, page 47, for evidence *held* sufficient to support a conviction as accomplice to murder in the second degree. *Id.*

7. To render a confession inadmissible upon the ground that it was induced by the promise of some benefit to the accused, such promise must be positive, and must be made or sanctioned by some one in authority, and be of such character as would be likely to influence the accused to speak untruthfully. The confession of an accused is not rendered inadmissible because it was made under the influence alone of fear of legal punishment. *Gentry v. State*, 80.

8. Evidence insufficient to support conviction for simple assault. *Dickenson v. State*, 121.

9. The indictment alleges both the ownership and possession of the alleged stolen animal to have been in one W. The evidence shows conclusively that, when taken, the animal was under the care, management and control of one F., who held it for W. *Held*, that the variance between the allegation and proof of possession is fatal to the conviction. *Alexander v. State*, 126.

10. Evidence *held* insufficient to support a conviction for theft. *Romero v. State*, 130.

11. Under the provisions of article 772 of the Code of Criminal Procedure, the written testimony of a witness, taken at the examining trial of the accused, can be read in evidence "when, by reason of age or bodily infirmity, such witness can not attend." Under this rule it is not

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essential that the bodily infirmity shall amount to a permanent disability. As a predicate for the admission of the written testimony on the examining trial, it was shown in this case that the witness was at home, in another county, forty miles distant, where, at the time of the trial, and for months before, he had been confined to his house from the effects of an attack of measles, which had destroyed one of his eyes and left him a chronic invalid, with constant pains in his head and palpitation of the heart. *Held*, that in admitting the written testimony in evidence the trial court did not err. *Collins and Lindly v. State*, 141.

12. The general rule is that the best evidence by which a fact can be proved must be produced or its absence be accounted for before secondary evidence can be resorted to. But an exception to this rule is that the official character of an alleged public officer need not be proved by his commission or other written evidence of the officer's right to act as such, except in an issue directly between the officer and the public. The trial court did not err in permitting a State's witness to testify that he was the justice of the peace who administered the oath upon which the false swearing was predicated. *Woodson v. State*, 153.

13. Bills of exception reserved to the action of the trial court excluding testimony will not be considered by this court unless they disclose the relevancy and materiality of the excluded evidence. *Id.*

14. Conditional pardon will not restore to one convicted of a felony competency to testify as a witness in the courts of this State. *Dudley v. State*, 163.

15. The State having introduced a conditionally pardoned convict as a witness against the defendant, the latter, for the purpose of assailing the credibility of the witness, proposed to read in evidence the judgment of conviction against him for felony, which, upon objection by the State, was excluded. *Held*, that the ruling was error. *Id.*

16. It is essential to the validity of a conviction for adultery that the evidence show affirmatively that one of the parties to the adulterous acts was married and had, at the time of the alleged adultery, a spouse other than the party with whom the adultery was charged. *Webb v. State*, 164.

17. The mere opinion of witnesses that a certain woman was the wife of the male charged with the adultery is not sufficient to establish the fact of marriage. *Id.*

18. An *actual living together*, as man and wife, of emancipated slaves, at the time when the Constitution of 1869 took effect, would constitute a legal marriage between said parties. But note that the evidence in this case fails to establish such a living together of the accused male and his alleged wife, or that they were emancipated slaves when said Constitution took effect; wherefore the evidence is insufficient to prove the legal marriage of the accused, and therefore insufficient to support a conviction for adultery. *Id.*

19. The prosecution in this case was for perjury committed upon the trial of one C. for burglary. The State was permitted to prove the testimony of the appellant before the grand jury upon the investigation of

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the charge against C., and his subsequent contradictory evidence upon the trial of C., and also his statements respecting the inducements under which he testified as he did upon the trial. *Held*, that the evidence was legitimate and was properly admitted. *Littlefield v. State*, 167.

20. The trial court having admitted in evidence the indictment against C. for burglary, and the judgment rendered upon that trial, should, in the charge to the jury, have limited and restricted the jury to the legitimate purpose of such testimony. This omission in the charge was fatal error. *Id.*

21. The prosecution in this case was for perjury, alleged to have been committed by the accused when he testified at the trial of one Williams for assault to murder. Upon the introduction of one Moore as a witness for the defense, in the present case, the State offered, and was permitted, over the defendant's objection, to read in evidence an indictment then pending against the said Moore, wherein the said Moore was charged with perjury upon the same trial as that in which the defendant is charged to have committed perjury. *Held* that, though the indictment was not admissible to impeach Moore's competency as a witness, it was admissible as matter going directly to his credibility, and as tending to show a motive for his testimony in this particular case. Being admissible for these purposes, it was not incumbent on the trial judge, in his charge, to limit and restrict it, inasmuch as it did not tend to exercise a wrong, undue or improper influence upon the jury as to the main issue. *Brown v. State*, 170.

22. See the statement of the case for evidence which, though conflicting, satisfied the jury, whose province it was to determine its weight and credibility, and is *held* sufficient to support a conviction for perjury. *Id.*

23. It is not essential that the State, on a trial for burglary, shall prove the non-consent of the owner, occupant or other authorized person to the entry. *Buchanan v. State*, 195.

24. Bills of exception to the exclusion of testimony must disclose the relevancy and materiality of the proposed testimony in order to receive the attention of this court. *Id.*

25. The evidence in this case showing that the road obstructed was not located in accordance with the order of the commissioners court establishing it, and that, therefore, it was not a public road; and that, whether a public or private road, it was obstructed by the accused, not wilfully, but with the belief, and with good cause to believe, that he had the legal right to obstruct it, does not support this conviction. *Owen v. State*, 201.

26. The corpus delicti being the issue under immediate inquiry, the State was permitted to ask its medical witness how, in his opinion, based upon the examination of the body, the injuries thereon were inflicted. The defense objected that the question called for the mere conclusion of the witness as an individual, and not for his opinion as an expert, and that it involved matter upon which the jury were as competent to form an opinion as the witness. The objection was overruled, and the

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witness was permitted to state his opinion as an individual as to "the only way he could imagine the peculiar injuries were inflicted." *Held*, that the objection should have been sustained, but that, in view of the other evidence in the case, the question and answer prejudiced no right of the accused; wherefore the error was immaterial. *Steagald v. State*, 207.

27. It is a well settled principle of law that if one willingly enters into a deadly conflict, or provokes the contest, or produces the occasion, in order to have a pretext for killing his adversary or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the conflict. Note the opinion for a state of proof in a murder case to which the rule applies, eliminating the issue of self defense. *Allen v. State*, 216.

28. Intent is a condition of the mind which may be evidenced by outward acts or words spoken. The evidence in this case shows that after the apparent abandonment of the dispute, and after the deceased had put away his pistol, and started to leave, but before he actually left the ground, the accused, displaying his pistol, said: "We had as well settle this thing now," and almost immediately fired upon deceased. The defense claims that, in charging upon the legal consequences of the renewal of the difficulty by the accused, the court erred in failing to instruct the jury that they might inquire into the intent of the accused in renewing it. *Held*, that the proof in question manifested the intent, and was undisputed; wherefore there was no issue requiring such an instruction. *Id.*

29. Note the opinion for a state of proof under which, in charging the jury upon the right of the accused to act upon the appearance of danger, the trial court did not err in instructing only upon the appearance of *real* danger. *Id.*

30. The indictment charged the possession and ownership of the alleged stolen horse to be in one J. C. B. The proof showed that the animal was taken by the accused from a place at which one Bull had hopped it by direction of D. H. B., who had borrowed the horse from J. C. B. *Held*, that the proof established the possession in D. H. B., and that the variance between the allegation and proof on the issue of possession is fatal to the conviction. *Conner v. State*, 245.

31. The proof showed that, for the purpose of detecting the accused in the very act of theft, the horse was hopped with the expectation and the intent that defendant would take him. It was contended by the defense that the proof established a taking with the consent of the owner. *Held*, that the position is without merit, as the owner in no way suggested the theft to the accused nor induced him to commit it. *Id.*

32. It was competent for the accused to prove that the deceased had no probable cause to charge him with felony, and did not believe the charge to be true when he made it, but such proof could not be made by the statement of a witness that he investigated the charge of felony made by the deceased against the accused and discovered no evidence to support it, such statement being merely the conclusion of the witness. *Tillery v. State*, 251.

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83. The defense in this case proposed to prove the declarations of T., the co-conspirator of the deceased, made subsequent to the homicide. *Held*, that the proposed proof was properly excluded, it being but hearsay, and not part of the *res gestæ*, nor admissible under the rule that the declarations of one conspirator, pending the conspiracy, are admissible against the other. *Id.*

84. To constitute a nocturnal burglary, under the statutes of this State, the house must have been entered by force, threats or fraud. The indictment in this case charges that the defendant "did by force, in the night time, break and enter the house," etc. *Held*, that, to authorize a conviction, under this indictment, it devolved upon the State to prove beyond a reasonable doubt that the accused entered the house by applying actual "force" to the building. In failing to so charge the jury, and in refusing to give a special instruction in substantial compliance with the rule announced, the trial court erred. *Melton v. State*, 287.

85. There was not only a total absence of evidence on this trial tending to show an entry by breaking or by force, as alleged in the indictment, but the proof was positive that the entry was made through an open door. *Held*, insufficient to support the conviction for burglary. *Id.*

86. The indictment in this case charges the theft of a "beef, an animal of the cattle kind." The proof shows that the alleged stolen animal was a cow. *Held*, that the term "cow" is embraced in the term "beef," and that there is no variance between the allegation and the proof. *Smith v. State*, 290.

87. Purchase of the animal was the defense relied upon by the defendant in this case, and it was an issue raised by the evidence. It was, therefore, the duty of the trial court, however improbable the evidence supporting the issue may have appeared, to submit the issue in charge to the jury, and the failure to do so was material error. *Id.*

88. Change of venue was applied for by the accused upon an affidavit setting out the existence of such prejudice against him in the county of the forum as would deprive him of a fair trial. This affidavit was met by the State by affidavit impeaching the means of knowledge of the compurgators of the accused, and upon this issue the trial court permitted the State to call a witness and ask him "if there was sufficient prejudice against the accused in Tarrant county to prevent a fair trial." The defense objected to the question as not pertinent to the issue. *Held*, that the evidence indicated was admissible as bearing upon the means of knowledge of the compurgators, and the objection was properly overruled. *Henning v. State*, 315.

89. Continuance is properly refused if, in view of the evidence on the trial, the absent testimony as disclosed in the application is either immaterial or is probably untrue. Note the statement of the case for such testimony set forth in an application for a continuance. *Id.*

40. As tending to establish the fraudulent intent of the accused in the transaction for which he was on trial, it was competent for the State to prove that, at a different time and place on the same day, the ac-

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cused attempted to pass the forged instrument to a different person than the party alleged as the injured person in the indictment. But the failure of the charge to limit and circumscribe the purpose and object of such evidence was fundamental error. *Burks v. State*, 826.

41. It is not only the province, but it is the duty of the trial judge to construe an alleged forged instrument, and to instruct the jury as to its legal effect, had it been genuine. In this case, the court properly charged that, if the alleged forged instrument were genuine, it would create a pecuniary obligation. *Id.*

42. Objections to the admission in evidence in this case of the alleged forged instrument were properly overruled, inasmuch as the letter S, before the figures \$48.00, imports nothing, is no part of the said instrument, and constitutes no part of the description of the said instrument. *Id.*

43. The trial court did not err in admitting in evidence the declarations of the defendant with regard to the transaction involved in the prosecution, made by him when not in custody nor under arrest. Nor was it error to permit the State to prove that defendant was known by another name than that he assumed in the county of the forum. *Id.*

44. While it was competent, in a prosecution for attempting to pass a forged instrument, for the State to prove that the accused attempted to pass the same forged instrument to another than the person alleged in the indictment, and at another time and place, it was incumbent on the court to charge the jury that such evidence was admissible only upon the issue of the fraudulent intent of the accused in the transaction on trial. Omission to so charge was fundamental error. *Burks v. State*, 832.

45. While a recorded brand is evidence of ownership, it and the brand found upon the animal must correspond and be identical, and it must appear on the part of the animal indicated in the record, or the discrepancy in this regard must be satisfactorily explained by the evidence. See the opinion for evidence held to show that the brand found upon the animal was different from the brand set out in the record, and, therefore, being the only evidence on the issue of ownership, and not sufficient upon that issue, is insufficient to support the conviction. *Myers v. State*, 834.

46. See the opinion and the statement of the case for evidence held to have been improperly excluded, because, under the facts in this case, it tended to support an issue of identity of the animal. *Id.*

47. The evidence in this case tending to support the defense that the accused killed the alleged stolen animal by direction of his employer, the charge of the court was erroneous in not instructing the jury that if they believed that the accused took the said animal by direction of his employer, for the use and benefit of his employer, believing at the time that his said employer owned or had a right to appropriate the animal, then the accused would not be guilty of theft, because of the absence of the fraudulent intent. *Id.*

48. See the statement of the case for evidence held insufficient to sup-

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port a conviction for theft, because insufficient to support the allegation of ownership of the alleged stolen animal. *Id.*

49. Evidence which tended to show that the alleged forged instrument was signed by the accused with the name and by direction of the purported drawer called for an affirmative charge to the effect that, if the jury believed such to be the fact, or had a reasonable doubt on that question, they should acquit. *Williams v. State*, 342.

50. In a prosecution for producing an abortion by an unlawful and violent assault, the injured female, although the wife of the accused, is a competent witness against him. *Navarro v. State*, 378.

51. The prosecutrix in this case, having testified to the violence inflicted upon her by the accused, was also permitted to testify to her subsequent delivery of two dead children, to the condition of the bodies, and, without first being qualified as an expert, to the fact that the abortion was the result of the violence inflicted upon her by the accused. *Held*, that the evidence was improperly admitted, under the rule that when "a claimed result becomes so remote that conclusion and deduction are necessary to connect it with a cause, the non expert witness can only state physical facts, leaving the conclusions to be drawn by the jury." This error, however, would, in this case, have been immaterial had the witness stated the facts upon which the opinion was based. *Id.*

52. Leading questions are permissible, even on direct examination, if the witness appears to be hostile to the party producing him, or is in the interest of the other party, or unwilling to give evidence. Note the opinion for a case in which, the witness coming within each of the exceptions to the general rule, her testimony was properly admitted. *Id.*

53. The prosecuting witness having testified on his direct examination that he found his stolen sheep in the possession of one D., and that D. at first agreed to surrender the animals, but subsequently refused to do so, was asked on his cross examination if D., when he refused to surrender the sheep, did not assign as his reason for so doing that he had purchased them. This question and the answer thereto were excluded as hearsay. *Held*: That the ruling was error, the question and the answer being legitimate under the rule that when "part of a conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other." *Stockman v. State*, 387.

54. The questions and answer should also have been admitted under the rule that "when an act is done to which it is necessary or important to ascribe a character, motive or object, what was said by the actor at the time, from which the character, motive or cause may be collected, is part of the res gesta—verbal acts—and may be given in evidence, whether the actor be or be not a party to the suit." *Id.*

55. A brand, although recorded after the commission of the offense, is admissible in evidence, but is not sufficient to prove ownership. *Crowell v. State*, 404.

56. A "road brand," as distinguished from a "range brand," is a brand required by statute to be placed upon cattle before being removed from the county in which they are gathered to market outside of the State,

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which brand must be recorded in the county from which the cattle are to be driven, and before their removal from such county. The brand introduced in evidence in this case was the "road brand" of the alleged owner which was recorded *after* the cattle were driven from the county where gathered, and after the commission of the offense. *Held*, that the said brand was inadmissible to prove ownership, and should have been excluded. *Id.*

57. As tending to establish identity in developing the *res gestae*, or to prove guilt by circumstances connected with the theft, or to show the intent of the accused with respect to the property described in the indictment, it is competent for the State to prove the theft by defendant, of other property at the same time and place of the theft in question, but it is not competent to prove a distinct theft committed by defendant at another time and place. See the statement of the case for evidence of distinct thefts *held* to have been erroneously admitted. *Williams v. State*, 412.

58. Jurisdiction is a question addressed to the court alone, and is not a subject for the consideration of the jury. Under this rule, the admission in evidence before the jury of the order changing the venue in the case because of prejudice against the accused, was erroneous. See the opinion in *extenso* on the question. *Shamberger v. State*, 433.

59. The admission in evidence of the order changing the venue was otherwise material error, under the rules that "evidence, to be admissible, must relate to relevant facts in issue," and that "a defendant is entitled to a verdict on competent evidence, and the admission, over his objection, of incompetent evidence which might influence a jury to his prejudice, requires a conviction to be set aside, even though there be sufficient legal evidence to sustain it." Note also the suggestion of this court, that the error of admitting the order changing the venue, intensified as it was by comment of prosecuting counsel, could not be cured by an instruction to the jury to ignore the change of the venue. *Id.*

60. See the statement of the case for evidence *held* to have been improperly admitted in a trial for swindling, inasmuch as it was both hearsay and immaterial to any issue in the case. But, had the same been admissible as bearing upon the question of intent, the charge of the court would be deficient in failing to limit it to that issue. *Moody v. State*, 458.

61. See the statement of the case for the evidence of the witness Hulen, *held*, though remote, to have been properly admitted as bearing upon the issue of intent. *Id.*

62. See the statement of the case in *Orman v. The State*, 23 Texas Court of Appeals, 604, for the evidence of an attorney at law, *held* not to partake of the nature of a "privileged communication," and to have been properly admitted. *Orman v. State*, 495.

63. It was not error to permit the State in a trial for perjury, to read in evidence the complaint filed in the cause upon the trial of which the perjury was alleged to have been committed, inasmuch as such evidence was competent to prove that the alleged false statements were made in the judicial proceeding and before the court alleged in the in-

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dictment, but, having admitted such evidence, the trial court, in its charge, should have limited its effect to such purpose only. *Higgenbotham v. State*, 505.

64. It is a general rule of evidence that the acts or declarations of a conspirator will not be admitted in evidence against his co-conspirator unless they were done or made pending the conspiracy, and were in furtherance of the common design. See the opinion in extenso on the question, and for a case in which the declarations of a co-conspirator were, under the rule announced, improperly admitted against the accused. *Cortez v. State*, 511.

65. With respect to the testimony of a State's witness, the trial court charged the jury as follows: "In contemplation of our law with reference to accomplice testimony, the court charges you that John Thomas, the witness introduced by the State, is an accomplice with the defendant," etc. *Helld*: Error, because the said charge was tantamount to an instruction to the jury that defendant was guilty as well as Thomas. The charge should have instructed the jury that the witness Thomas was an accomplice in the commission of the offense, and that the defendant could not be convicted upon the testimony of Thomas unless it was legally corroborated. *Spears v. State*, 537.

66. See the statement of the case for evidence which, tending to show that the act of the accused was neither willfully nor maliciously done, within the legal signification of those terms, was erroneously excluded by the trial court, such evidence being competent upon the question of intent. *Bowers v. State*, 542.

67. The general rule obtains in this State that each conspirator is responsible for everything done by his confederates which follows immediately in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. In other words, the act must be the ordinary and probable effect of the wrongful act specifically agreed upon, so that the connection between them may be reasonably apparent, and must not be a fresh and independent product of the mind of one of the confederates, outside of, or foreign to, the common design. Whether or not the act was the ordinary and probable effect of the common design or conspiracy, or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, are questions which, under proper instructions, should be submitted to the jury for solution. *Id.*

68. Proof of the non-age of the accused at the time of the commission of the offense imposes upon the State the burden of proving that when he committed the offense, if he did commit it, he understood the nature and illegality of the act. This proof is not sufficiently made if the State merely shows that he knew the difference between good and evil, or that he was possessed of the intelligence of ordinary boys of his age. On the contrary, it must be affirmatively shown that he had sufficient discretion to understand the nature and illegality of the particular act constituting the crime. *Carr v. State*, 562.

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69. It is not necessary that the proof of discretion should be made by positive evidence. In many cases, circumstances of education, habits of life, general character, moral and religious training, and, oftentimes, the circumstances connected with the offense will be sufficient to satisfy the jury that the accused had the discretion required to render him responsible for the crime. *Id.*

70. One of the exceptions to the general rule that a witness can speak only as to facts, and will not be permitted to express his belief or opinion, is that, when the issue is as to the sanity of a person, even the non-expert witness may state his opinion and conclusion upon the facts to which he has testified. This rule will comprehend the inquiry as to whether or not, on account of non-age, the accused had sufficient discretion to understand the nature and illegality of the acts constituting the crime charged against him; and the witness, having stated the facts upon which he based his opinion, may state his opinion as to the discretion of the accused. *Id.*

71. See the statement of the case for circumstances under which it is held that the confession of the accused was properly admitted in evidence against him. *Id.*

72. It is not incumbent upon the trial court to give in charge to the jury the law applicable to circumstantial evidence, unless the State, in seeking a conviction, relies wholly upon that character of evidence. Note that this rule, in view of the confession of the accused, applies to this case. *Id.*

73. The credibility of the witnesses and the weight of the evidence are questions addressed to the trial jury alone. In passing upon the truth of a confession, a part of which has been contradicted by other evidence, it is within the power of the jury to accept one portion of the confession as true, and to reject as untrue that which has been contradicted by other testimony. *Id.*

74. See the statement of the case for evidence held sufficient to support a conviction for burglary. *Id.*

75. At a former term of the trial court the defendant was tried and convicted of theft, but upon the affidavit of his co-defendant, who was separately tried and acquitted, he was awarded a new trial. Upon this trial, his co-defendant having departed this life, the defendant offered in evidence the affidavit of his co-defendant upon which he secured the new trial. Held, that the proposed evidence was properly excluded. *Stockholm v. State*, 598.

76. The trial court charged the jury as follows: "When the general reputation of a witness for truth and veracity in the community in which he lives has been attacked, the inquiry must be confined to his general reputation, and not what a particular individual or a few individuals may believe concerning him; and the investigation is to be confined to his general reputation for truth and veracity, and should not extend to his general moral character; and the jury is authorized to refuse to credit and believe any witness whose reputation has been so attacked, or you may credit and believe him as you see fit and proper and

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Believe to be proper to do so, just as though his reputation had not been so attacked; for, as before told you, you are the sole and exclusive judges of the credibility of each and all of the witnesses who have testified before you in the case." *Held*, in view of the evidence in this case, materially erroneous. *Id.*

77. On a trial for theft the State, over the objection of the accused, was permitted to prove that, for the four or five years prior to the trial, the accused had been confined in the penitentiary for felony. *Held*, that the proof was illegal and incompetent. Its admission was error in the first place, and the trial court further erred in overruling the motion of the accused to exclude it from the consideration of the jury. *Guajardo v. State*, 603.

78. It is expressly provided by statute that "persons charged as principals, accomplices or accessories, whether in the same indictment or different indictments, can not be introduced as witnesses for one another." *Gray v. State*, 611.

79. On his trial for theft of lost property, the defendant offered one Nancy Gray as a witness in his behalf. The State objected to the competency of the proposed witness upon the ground that a separate indictment was pending against her, wherein she was charged with receiving and concealing the stolen property for the theft of which the defendant was on trial. The objection was sustained by the trial court. The evidence disclosed that the proposed witness was the mother of the defendant. In view of the rules above announced, it is *held* that, inasmuch as the witness was not charged as a principal, accomplice or accessory in the theft, she was a competent witness, and the trial court erred in holding her incompetent. *Id.*

80. Under the rules of practice obtaining in this State, a conviction can not be had upon the testimony of an accomplice unless it be strongly corroborated by other evidence; and an accomplice can neither corroborate himself nor another accomplice. Another rule is that if a witness implicates himself in the offense it is immaterial that he claims to have been coerced—no matter what his motive, if he agrees to and does participate in the offense, he is an accomplice or particeps criminis. *Blakely v. State*, 616.

81. It is an established and statutory rule of evidence in this State that "persons charged as principals, accomplices or accessories, whether in the same indictment or in different indictments, can not be introduced as witnesses for each other." Under this rule the declarations of a principal co-defendant were, in this case, properly excluded, they being no part of the res gesta. *Blain v. State*, 626.

82. See the statement of the case for a charge of the court upon the doctrine of principals in crime *held* correct. *Id.*

83. See the statement of the case for evidence *held* sufficient to support a conviction for theft. *Id.*

84. Under our practice, a witness called by the opposing party may be discredited by proving that on a former occasion he made a statement inconsistent with his testimony on the trial, provided such statement be

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EVIDENCE—continued.

material to the issue. The witness may also be discredited by proof that, on a former trial, he omitted to state facts stated by him on the pending trial. And generally, whenever, on a former occasion, it was the duty of the witness to state the whole truth, it is admissible to show that in his statement he omitted facts sworn to by him at the trial. But it is only upon a denial, direct or qualified, by the witness, that such statements were made, that proof of them can be made. The impugned witness in this case not only did not deny the inconsistent statements imputed to her, but admitted that she made them. *Held*, that under the rule announced, the impeaching testimony was erroneously admitted. *Williams v. State*, 687.

85. It is now a well settled rule of practice in this State that an impeached witness may be corroborated by proof that he had at other times made the same statements as those testified to by him on the trial, and about which he was impeached. Under this rule, it is *held* that the trial court erred in refusing to permit the defendant to introduce proof to support his impeached witness by showing that, prior to the trial, she made statements substantially the same as those she made on the trial and about which she was impeached. *Id.*

86. The indictment alleged the ownership of the property stolen to be in Columbus C. Littlefield, and the proof disclosed that, though his proper name was Christopher Columbus Littlefield, he was usually known as Columbus Littlefield, and was often addressed as Columbus C. Littlefield. *Held*: That, if the proof showed that he was as well known by the name set out in the indictment as by any other, a conviction otherwise regular would be sustained. *Lott v. State*, 723.

EXECUTIVE PARDON.

See HABEAS CORPUS, 1.

1. Conditional pardon will not restore to one convicted of a felony competency to testify as a witness in the courts of this State. *Dudley v. State*, 163.

2. The State having introduced a conditionally pardoned convict as a witness against the defendant, the latter, for the purpose of assailing the credibility of the witness, proposed to read in evidence the judgment of conviction against him for felony, which, upon objection by the State, was excluded. *Held*, that the ruling was error. *Id.*

EXCEPTIONS.

See EVIDENCE, 23.

PRACTICE, 85.

1. Article 529 of the Code of Criminal Procedure expressly provides that the want of the signature of the foreman of the grand jury is no matter of exception to an indictment and can not affect its validity. *Robinson v. State*, 4.

2. The action of the trial court in refusing an application for continuance will not be revised unless exception to such action is presented by proper bill. *Williams v. State*, 32.

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EXCEPTIONS—continued.

3. Bills of exception reserved to the action of the trial court excluding testimony, will not be considered by this court unless they disclose the relevancy and materiality of the excluded evidence. *Woodson v. State*, 158.

4. The charge of the court in this case was deficient in failing to instruct the jury as to the legal meaning of the terms "willful" and "deliberately," but, inasmuch as no exception was reserved to the omission, and it was practically supplied by a special instruction given to the jury, the omission is *held* to have been without prejudice to the accused, and the charge sufficient in substance. *Id.*

5. Bill of exceptions reserved to the overruling of a challenge to a juror for cause, is not complete, nor will it be considered by this court if it neither shows that the juror served on the jury, nor that he was challenged peremptorily by the accused, and that an objectionable juror was forced upon the accused after his peremptory challenges were exhausted. *Henning v. State*, 815.

6. Bills of exception, unless filed during the term or within ten days after the expiration of the term of the lower court, will not be considered by this court on appeal. *Stewart v. State*, 418.

EXPERT TESTIMONY.

See BILL OF EXCEPTIONS, 51.

F.**FACT CASES.**

1. Evidence sufficient to support a conviction for indecent publications. *Smith and Coker v. State*, 1.

2. Possession of stolen property by the accused, however recent that possession may be, if explained and accounted for, and shown by the evidence to be lawful, will afford against the accused no legal presumption of guilt of theft. See the opinion for the substance of evidence *held* insufficient to support a conviction for the theft of a mare. *Bean v. State*, 11.

3. See opinion and the statement of the case for evidence *held* insufficient to support a conviction for burglary with intent to commit rape. *Turner v. State*, 12.

4. Evidence sufficient to support a conviction for murder in the second degree. *Melton v. State*, 47.

5. See the statement of the case in this and in Melton's case, ante, page 47, for evidence *held* sufficient to support a conviction as accomplice to murder in the second degree. *Farker v. State*, 61.

6. Evidence sufficient to support a conviction for murder of the first degree. *Heard v. State*, 108.

7. Evidence insufficient to support a conviction for simple assault. *Dickenson v. State*, 121.

8. To constitute an assault with intent to murder, it must appear, 1, that an assault, coupled with an ability to commit a battery, was committed; and, 2, that at the time there existed in the mind of the offender

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FACT CASES—continued.

a specific intent to kill. See the opinion for a state of case demanding of the trial court a charge in harmony with the rule stated, and note the statement of the case for evidence, which, however sufficient to establish an assault with intent to alarm, is insufficient to support a conviction for assault with intent to murder. *McCullough v. State*, 128.

9. Evidence insufficient to support a conviction for theft. *Romero v. State*, 130.

10. See the statement of the case for evidence held sufficient to support the conviction for theft of the defendant Collins, but insufficient to support the conviction of Lindly. *Collins and Lindly v. State*, 141.

11. Evidence insufficient to support a conviction for adultery. *Webb v. State*, 164.

12. See the statement of the case for evidence which, though conflicting, satisfied the jury, whose province it was to determine its weight and credibility, and is held sufficient to support a conviction for perjury. *Brown v. State*, 170.

13. See the opinion in extenso, for the substance of evidence held sufficient to establish the insanity of the accused, and, therefore, insufficient to support a conviction for murder. *Massengale v. State*, 181.

14. See the statement of the case for evidence sufficient to support a conviction for assault with intent to rape, but also for newly discovered evidence held to have demanded of the trial court the award of a new trial. *McCleaveland v. State*, 202.

15. See the statement of the case in *Melton v. The State*, 28 Texas Court of Appeals, 204, for evidence held sufficient to support a conviction for attempt to rape. *Melton v. State*, 284.

16. See the statement of the case for evidence adduced in a habeas corpus proceeding for bail under a charge of murder, held insufficient to support a judgment denying bail. *Ex parte Henson*, 305.

17. Evidence sufficient to support a conviction of murder of the first degree. *Henning v. State*, 315.

18. Evidence insufficient to support a conviction for gaming. *Borders v. State*, 333.

19. See the statement of the case for evidence held insufficient to support a conviction for theft, because insufficient to support the allegation of ownership of the alleged stolen animal. *Myers v. State*, 334.

20. Evidence insufficient to support a conviction for adultery. *Mitten and Hamilton v. State*, 346.

21. See the opinion and the statement of the case for evidence held insufficient to support a conviction for assault with intent to commit rape, because insufficient to show the use of force or attempted force. *Carroll v. State*, 366.

22. See the statement of the case for the substance of evidence set out in a motion for new trial, which, though not strictly newly discovered, in the light of the evidence on the trial entitled the defendant to a new trial. *Roy v. State*, 369.

23. See the opinion in extenso for a summary of the inculpatory proof in this case held insufficient to support a conviction for theft of cattle. *Moreno v. State*, 401.

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FACT CASES—continued.

24. Evidence insufficient to support a conviction for theft. *Crowell v. State*, 404.

25. See the statement of the case for evidence held insufficient to identify the animal traced to the possession of the accused as the alleged stolen animal described in the indictment, and, therefore, insufficient to support the conviction for theft. *Stewart v. State*, 418.

26. Evidence insufficient to support a conviction for burglary. *Field v. State*, 422.

27. Evidence insufficient to support a conviction for fraudulent disposition of mortgaged property. *Presley v. State*, 494.

28. To constitute theft the taking of the property must have been wrongful, unless the possession of the property was obtained by some false pretext, or the taking was accompanied by the intent to deprive the owner of the value of the property. Conversion by the accused of property lawfully obtained is not sufficient to establish the fraudulent intent at the time of the taking. See the opinion in extenso for the substance of evidence held insufficient to support a conviction for horse theft. *Stokeley v. State*, 509.

29. Evidence insufficient to support a conviction for incest. *Dodson v. State*, 514.

30. Evidence insufficient to support a conviction for assault and battery. *Ware v. State*, 521.

31. Evidence insufficient to support a conviction for theft. *Gilleland v. State*, 524.

32. Evidence insufficient to support a conviction for theft. *Guest v. State*, 530.

33. Evidence sufficient to support a conviction for burglary. *Carr v. State*, 562.

34. The issue in this case was whether the defendant fabricated the narrative of the homicide committed by his principal, which was related upon the inquest over the deceased by the witnesses who testified against him on this trial. That issue was supported only by the uncorroborated testimony of the two witnesses who claimed that they testified to the fabricated statement upon the inquest because commanded to do so by the defendant, and because they were in fear of the defendant and his principal. Held that, in the absence of corroborating testimony, the evidence is insufficient to support this conviction. *Blakely v. State*, 616.

35. Evidence sufficient to support a conviction for theft. *Blain v. State*, 626.

36. Evidence sufficient to support a conviction for murder of the second degree. *Thumm v. State*, 667.

37. A conviction for perjury, to be legally obtained, must be had upon the testimony of at least two credible witnesses, or that of one credible witness strongly corroborated by other evidence. See the statement of the case for evidence which, though conflicting, is held sufficient to support the conviction for perjury. *Anderson v. State*, 705.

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FALSE SWEARING.

The general rule is that the best evidence by which a fact can be proved, must be produced or its absence be accounted for before secondary evidence can be resorted to. But an exception to this rule is that the official character of an alleged public officer need not be proved by the commission or other written evidence of the officer's right to act as such, except in an issue directly between the officer and the public. The trial court did not err in permitting a State's witness to testify that he was the justice of the peace who administered the oath upon which the false swearing was predicated. *Woodson v. State*, 138.

FENCE CUTTING.

See the statement of the case for the charging part of an indictment held sufficient to charge the offense of fence cutting. *Spears v. State*, 537.

FLIGHT.

See PRACTICE, 87.

FORGERY.

1. The prosecution in this case was for attempting to pass a forged instrument to one H. The evidence adduced upon the plea of former conviction showed that the instrument described in the two indictments was one and the same, but that the other attempt was to pass it to another person than H., at a different time and place. Held, that the transactions were different, and constituted different and distinct offenses; wherefore a conviction for the one could not bar a prosecution for the other. *Burks v. State*, 326.

2. As tending to establish the fraudulent intent of the accused in the transaction for which he was on trial, it was competent for the State to prove that, at a different time and place on the same day, the accused attempted to pass the forged instrument to a different person than the party alleged in the indictment. But the failure of the charge to limit and circumscribe the purpose and object of such evidence was fundamental error. *Id.*

3. It is not only the province, but it is the duty of the trial judge to construe an alleged forged instrument, and to instruct the jury as to its legal effect, had it been genuine. In this case the court properly charged that, if the alleged forged instrument was genuine, it would create a pecuniary obligation. *Id.*

4. Objections to the admission in evidence in this case of the alleged forged instrument were properly overruled, inasmuch as the letter S before the figures \$43.00 imports nothing, is no part of the said instrument, and constitutes no part of the description of the said instrument. *Id.*

5. The trial court did not err in admitting in evidence the declarations of the defendant with regard to the transactions involved in the prosecution, made by him when not in custody nor under arrest. Nor was it error to permit the State to prove that defendant was known by another name than that he assumed in the county of the forum. *Id.*

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FORGERY—continued.

6. The State introduced in evidence the alleged forged instrument before proving that the same was written by the accused, but subsequently produced such proof. *Held*, that such practice, though irregular, was not materially erroneous. *Williams v. State*, 342.

7. See the opinion for the contents of a written instrument *held* to be sufficiently certain to be made the subject of an indictment for forgery. *Id.*

FORMER ACQUITTAL AND CONVICTION.

1. The provision of the statute (Code Crim. Proc., art. 712) which requires that in passing upon a special plea (such as a plea of former conviction) interposed as a defense to a prosecution for crime, the verdict shall specially find whether the plea is true or untrue, is mandatory, and can not be eluded upon the ground that the failure of the verdict to so find worked no prejudice to the accused. *Burks v. State*, 326.

2. The prosecution in this case was for attempting to pass a forged instrument to one H. The evidence adduced upon the plea of former conviction showed that the instrument described in the two indictments was one and the same, but that the other attempt was to pass it to another person than H., at a different time and place. *Held*, that the transactions were different, and constituted different and distinct offenses; wherefore a conviction for the one could not bar a prosecution for the other. *Id.*

3. Conspiracy to commit burglary is a distinct offense created by the statutes of this State, and it is complete when two or more persons have positively agreed between themselves to commit burglary, though the burglary be never committed. If a burglary and a conspiracy to commit burglary involve the same transaction, the two offenses of burglary and conspiracy to commit burglary may be carved out of the same transaction, and a conviction for the one will not bar a prosecution for the other. See the opinion in extenso for an exhaustive discussion of the doctrine. *Whitford v. State*, 489.

4. It is well settled in this State that the stealing of different articles of property, belonging to different owners, at the same time and place, so that the transaction is the same, is but one offense, and the accused can not be convicted on separate indictments charging different parts of one transaction as in each a distinct offense. A conviction on one of the indictments bars a prosecution on the other. *Willis and Boyd v. State*, 586.

5. The proof on the trial showed that the defendants had been separately convicted for the theft of a cow, the property of one W. The animal involved in this prosecution was alleged to be the property of one C., and was found in the possession of the defendants at the same time and place and under the same circumstances as the W. cow. It showed, also, that when last seen, before being found in the defendants' possession the W. cow was on her range a mile and a half west of the town of A., and that the C. cow, when last seen before she was found in the possession of the defendants, was on her range several miles southwest from the

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FORMER ACQUITTAL AND CONVICTION—continued.

said town of A. Under this proof, the defendants pleaded in bar to this prosecution their former conviction for the theft of W.'s cow, alleging the taking of the two cows to be but one transaction. The jury found against the truth of the special plea. *Held*, that the finding of the jury was supported by the proof, and was correct. *Id.*

6. In response to an inquiry by the jury the trial judge instructed them that the burden of proving their special plea of former conviction rested upon the defendants. *Held*, correct. *Id.*

FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY.

The indictment in this case alleges that the mortgaged property was fraudulently disposed of by the accused to some person to the grand jury unknown. The evidence shows that it was disposed of to one Ike Thomas, and that the grand jury either knew, or by the exercise of reasonable diligence could have ascertained, that fact. *Held*, that the indictment is sufficient to charge the offense of fraudulently disposing of mortgaged property, but the evidence disproving an essential allegation in the said indictment, is insufficient to support the conviction. *Presley v. State*, 494.

G.**GALVESTON COUNTY.**

See JURISDICTION, 1.

GAMING.

1. Indictment charged the appellant with "unlawfully permitting a game with dice to be played and bet at in a house under his control, the said house being then and there a public place, to wit, a house for retailing spirituous liquors." *Held*, that under article 365 of the Penal Code, as amended by the act of March 5, 1881, the indictment is sufficient. *Robinson v. State*, 4.

2. It is no offense against the laws of this State to bet or wager at a game played with dice or dominoes at a private residence. *Borders v. State*, 383.

H.**HABEAS CORPUS.**

See LIQUOR TRAFFIC.

1. The relator being confined in the penitentiary of this State under seven different convictions for felony, applied to the Governor for pardon, and, on the twenty-fifth day of August, 1886, the Governor issued his charter of pardon to cover each of the seven convictions, which charter of pardon he delivered to the agent of the relator, who in turn delivered it to the superintendent of the penitentiary, and demanded upon it the release of the relator. The superintendent, acting upon telegraphic orders from the Governor, refused to release the relator, retained the said charter of pardon, and subsequently returned it to the Governor, who indorsed upon it his order of cancelation because it "was

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HABEAS CORPUS—continued.

issued upon misinformation." On the thirtieth day of March, 1887, the relator sued out a writ of habeas corpus, and upon the hearing of the same he introduced in evidence the said charter of pardon, indorsed as above stated. He was remanded to custody, and appealed to this court. Upon the hearing of the appeal this court held that a pardon procured by fraud was absolutely void, and that, having relied upon the charter of pardon, indorsed as above, the relator established against himself a prima facie procurement of the pardon by fraud and assumed the burden of proving no fraud, which, failing to do, he was not entitled to release, and the judgment of the lower court was affirmed. On the tenth day of August, 1887, the relator applied for a second writ of habeas corpus, which, being granted and heard, he was again remanded to custody, from which judgment he prosecutes this appeal. The Assistant Attorney General moves to dismiss this appeal because there is a former and unreversed adjudication upon this same state of facts, and because the said former adjudication was pleaded in bar, and no newly discovered evidence is set up as a reason for opening up the former judgment for revision. But *held*: 1. A second writ of habeas corpus is obtainable under the laws of this State when it is made to appear that important testimony has been obtained which, though not newly discovered, or which, though known to the applicant, could not be produced by him at the former hearing. 2. In passing upon second appeals in habeas corpus cases this court is not called upon to determine whether or not the evidence is newly discovered, but will consider the evidence as it was adduced on the hearing and is presented in the record. The motion to dismiss the appeal is overruled. See the opinion in extenso for the substance of evidence adduced on the hearing below, which is held to remove the taint of fraud in the acquisition of the pardon as exhibited on the first hearing, and, therefore, to entitle the applicant to his discharge. *Ex parte Rosson*, 226.

2. See the statement of the case for evidence adduced in a habeas corpus proceeding for bail under a charge of murder, *held* insufficient to support a judgment denying bail. *Ex parte Henson*, 805.

3. All district judges of this State are authorized by the Constitution to grant the writ of habeas corpus in felony cases, and it is a statutory principle that "every provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy and protect the rights of the person seeking relief under it." Another well settled rule is that "a party's right to the writ does not depend upon the legality or illegality of his original caption, but upon the legality or illegality of his present detention." Under these rules the judge below had the power to grant and hear the writ of habeas corpus in this case, and this court acquired jurisdiction by appeal; wherefore the State's motion to dismiss the appeal is overruled. *Ex parte Trader*, 393.

4. The relator was indicted for murder in K county. He secured a change of venue to D county, where he was admitted to bail. Upon his release he went to E county where, under statutory proceedings had

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HABEAS CORPUS—*continued.*

in the county court, he was legally declared to be a lunatic, and was ordered to be confined in the State Lunatic Asylum, but subsequently, under the provisions of Article 118 of the Revised Statutes, he was placed in the custody of relatives and friends who entered into bond to care for and restrain him. Subsequently the case against him for murder was called in the district court of D county, and upon his default his bail bond was forfeited, and alias capias for his arrest was awarded, which was afterwards executed by the sheriff of E county. Thereupon his custodians, who held him as a lunatic under the authority of the county court of E county, applied to the judge of the district court of E county for the writ of habeas corpus. The writ was granted, but upon the hearing of the same, the said district judge remanded the relator to the custody of the sheriff. Upon this state of case, the custodians of the relator insist, on this appeal, that there is no mode provided by our law by which the sanity of an accused can be inquired into in the district court *before* the commencement of the trial upon the merits of the case under the indictment; and that, if insane, or he becomes so after the commission of the offense, he can not be placed upon trial while in such condition—which latter proposition is statutory. But that statute (Penal Code, art. 39) has been held to mean that "when a defendant charged with felony has become insane, a jury should be impaneled to try the issue of insanity, before proceeding with the cause upon its merits." Upon this whole case it is *held* that the district judge of E county properly awarded the writ of habeas corpus, but, under the provisions of Article 137 of the Code of Criminal Procedure, which provides that "after indictment found, the writ of habeas corpus must be made returnable in the county where the offense has been committed," the same should have been made returnable to the judge of the district court of K county; and this court so orders. *Id.*

5. A county convict, against whom a fine and costs have been adjudged, and who, in default of the payment of the same, has been put to labor on the county farm, is entitled to receive a credit against his fine and costs of one dollar per day for each day that he labors; and, when he has labored on the county farm a sufficient length of time to satisfy fine and costs, at the rate of one dollar per day, he is entitled to his discharge. *Ex parte Dampier*, 561.

I.

IMPEACHING TESTIMONY.

See EVIDENCE, 20, 76, 84, 85.

IMPEACHMENT.

See WITNESS, 1.

INCEST.

See the statement of the case for evidence *held* to be insufficient to support a conviction for incest, inasmuch as it rests upon the uncorroborated testimony of a witness shown by the other proof to be a participant criminis. *Dodson v. State*, 514.

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INDECENT PUBLICATION.

See CHARGE OF THE COURT, 2.

The indictment, setting out *in hæc verba* the obscene and indecent composition, charged that the appellants "did unlawfully make and publish an indecent and obscene written composition, manifestly designed to corrupt the morals of youth." *Held*, that the indictment is sufficient; and that, the composition being set out *in hæc verba*, it was unnecessary that the indictment should allege the manner and means of the making of the same, or the circumstances attending the publication thereof. How and where the composition was made and published were matters of proof, and not pleading. *Smith and Coker v. State*, 1.

INDICTMENT.

See ATTEMPT TO RAPE,

BURGLARY, 9, 10.

THEFT, 17, 43.

1. The indictment, setting out *in hæc verba* the obscene and indecent composition, charged that the appellants "did unlawfully make and publish an indecent and obscene written composition, manifestly designed to corrupt the morals of youth." *Held*, that the indictment is sufficient; and that, the composition being set out *in hæc verba*, it was unnecessary that the indictment should allege the manner and means of the making of the same, or the circumstances attending the publication thereof. How and where the composition was made and published were matters of proof, and not pleading. *Smith and Coker v. State*, 1.

2. Indictment charged the appellant with "unlawfully permitting a game with dice to be played and bet at in a house under his control, the said house being then and there a public place, to wit, a house for retailing spirituous liquors." *Held*, that under article 365 of the Penal Code, as amended by the act of March 5, 1881, the indictment is sufficient. *Robinson v. State*, 4.

3. The law does not require that, upon the transfer of an indictment from the district to the county court, the certificate of the clerk, certifying the transfer, shall recite that such indictment was signed or not signed by the foreman of the grand jury which presented it. *Id*.

4. Article 529 of the Code of Criminal Procedure expressly provides that the want of the signature of the foreman of the grand jury is not matter of exception to an indictment and can not affect its validity. *Id*.

5. Indictment conforming to No. 133 of Willson's Criminal Forms is sufficient to charge the offense of breaking into a jail to rescue a prisoner, as that offense is defined by article 212 of the Penal Code. *Williams v. State*, 17.

6. The conviction in this case was for burglary. It was had under an indictment which charged conjointly the offenses of burglary and theft. The allegations were that defendant did burglariously enter the house with the intent to commit theft, and that he did commit theft of certain personal property. The indictment proceeded to allege, not the elements of the theft which it charged he *intended* to commit, but the elements of the theft which he *did* commit. The contention of the

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INDICTMENT—continued.

appellant is that the indictment is insufficient to support the conviction for burglary, because it failed to allege the elements of the *intended* theft. *Held*, that, alleging the elements of the theft *actually* committed, the indictment is sufficient to support the conviction for burglary. *Williams v. State*, 69.

7. If the purpose of the pleader had been merely to charge a burglary with intent to commit an offense, and not to charge burglary and the actual commission of the offense, then the indictment would be insufficient unless it alleged the elements of the intended offense. *Id.*

8. The rule is, that if burglary and theft be charged in the same count, and the party charged be convicted, the theft will be included in the burglary, and no judgment can be rendered for the theft. In such case, however, the conviction for burglary will bar a subsequent prosecution for the theft. *Id.*

9. "Actual care, control and management" of the alleged stolen property is, under our statute defining theft, such possession as will support an allegation of possession. *Tinney v. State*, 112.

10. The indictment in this case alleged both the ownership and possession in D. The proof showed that, though the animal belonged to D., one H. found it on his premises, took it up, and staked and fed it on his premises, and proclaimed his intention to stray it. But, before H. could complete the estray of the said animal, it was stolen from the stake on his premises. *Held*, that the proof shows that H. had the "care, control and management" of the horse, which constituted possession; and therefore the variance between the allegation and proof of possession is fatal to the conviction. *Id.*

11. An indictment for swindling by false pretense should positively and clearly aver the commission of the acts by the accused. If a written instrument enters into the offense as matter of inducement, the said instrument should be set out, as in forgery. See the statement of the case for an indictment *held* insufficient to charge the offense of swindling by false pretense; wherefore the motion in arrest of judgment should have prevailed. *Dwyer v. State*, 132.

12. Indictment for burglary by force, threats and fraud, although it fails to charge that the offense was committed by day or by night, will support a conviction if the proof shows that the entry was effected by actual force in the night time applied to the building. Note the approval of Carr's case, 19 Texas Court of Appeals, 685, and Martin's case, 21 Texas Court of Appeals, 1. *Buchanan v. State*, 195.

13. Information or indictment for theft of the property of a corporation must not only describe the corporation by its correct corporate name, but should allege that it was a corporation. Allegation that the "Mo. P. Rway Company" was the owner of the stolen property will not suffice. See the opinion in extenso for a discussion of the question, and for the substance of an information *held* insufficient to charge the offense of theft. *White v. State*, 231.

14. See the statement of the case for an indictment *held* sufficient to charge the offense of producing an abortion by an unlawful assault upon a pregnant woman. *Navarro v. State*, 378.

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INDICTMENT—*continued.*

15. A misstatement in an indictment as to the day on which the term of the court at which the same was presented began goes to the form and not to the substance of the indictment, and may be amended under the order of the court by merely erasing the wrong date and substituting the proper one. Moreover, such amendment is unnecessary, as the allegation of the time when the term began was mere surplusage. *Osborne v. State*, 398.

16. Indictment charged the offense of swindling by means of a promissory note, which, though he knew it to be neither valid nor genuine, the accused represented to be good, valid and genuine. The indictment sets out the note in *hæc verba*, and upon its face it appears to be a valid obligation. The indictment, however, fails to allege the facts which render the note invalid and worthless. Exception to the indictment and a motion in arrest of judgment based upon this omission were overruled. *Held*, that the exception and the motion in arrest were well taken, and should have prevailed. *Wills v. State*, 400.

17. The indictment in this case alleges that the mortgaged property was fraudulently disposed of by the accused to some person to the grand jury unknown. The evidence shows that it was disposed of to one Ike Thomas, and that the grand jury either knew, or by the exercise of reasonable diligence could have ascertained, that fact. *Held*, that the indictment is sufficient to charge the offense of fraudulently disposing of mortgaged property, but the evidence disproving an essential allegation in the said indictment, is insufficient to support the conviction. *Presley v. State*, 494.

18. See the statement of the case for the charging part of an indictment *held* sufficient to charge the offense of fence cutting. *Spears v. State*, 537.

19. Indictment is sufficient to charge a murder by express malice aforethought, and, therefore, murder of the first degree, if it charges that the accused "did, with malice aforethought, kill the deceased [naming him] by shooting him with a pistol." *Banks v. State*, 559.

20. See the opinion for an indictment held sufficient to charge the accused as an accessory to murder, as accessory is defined by article 86 of the Penal Code. *Blakely v. State*, 616.

INFORMATION.

See INDICTMENT, 13.

1. "Public place," as that term is used in article 144a of the Penal Code, denouncing a penalty for intoxication in a public place, does not mean a place devoted solely to the uses of the public, but it means a place which, in point of fact, is public, as distinguished from private, a place that is visited by many persons, and that is usually accessible to the neighboring public. A grand jury room, during the session of the grand jury, is, under the above definition, *held* to be a public place; and an information so charging it is good. See the opinion in extenso on the question. *Murchison v. State*, 8.

2. The constitutional and statutory provisions which require that all

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INFORMATION—*continued.*

prosecutions in this State, whether by information or indictment, shall be carried on "in the name and by the authority of the State of Texas," necessitate that it so appear from the information or indictment, but do not in misdemeanor cases require that it shall so appear from the complaint. The trial court did not, therefore, err in this case in overruling a motion in arrest of judgment based upon the insufficiency of the complaint because it does not begin with the words: "In the name and by the authority of the State of Texas." *Jefferson v. State*, 535.

INSANITY.

1. Article 960 of the Code of Criminal Procedure of this State provides that "when, upon the trial of an issue of insanity, it is found that the defendant is sane, the judgment of conviction shall be enforced as if no such inquiry had been made." The effect of this statute is to declare that the judgment of the trial court adjudging the defendant to be sane shall be conclusive of that issue, and that, thereupon, the judgment of conviction shall be enforced. *Darnell v. State*, 6.

2. Appeal to this court can be prosecuted only after the trial and conviction of the accused in the lower court for an offense and the entry of final judgment against him, which must appear in the record. A judgment rendered in an ex parte proceeding in the trial court, upon the issue of insanity of the accused, after his trial and conviction of an offense, is not such a judgment as will support an appeal to this court. *Id.*

3. In 1888 the appellant in this case was tried and convicted in the district court of Wood county for murder of the first degree. On his appeal to this court the judgment of conviction rendered below was affirmed. Subsequent to this affirmance, and before sentence was pronounced, information was filed in the district court setting forth that the accused had become insane. The trial of this issue resulted in a judgment of insanity against the appellant and he was confined in the State Lunatic Asylum. In the process of time he was discharged from said asylum as sane, and was delivered to the sheriff of Wood county. Thereupon a statutory affidavit, alleging that the appellant had become sane was filed in the district court, and, upon the hearing of the issue, thus presented, the jury found, and the court adjudged, the appellant to be sane. From this judgment this appeal is prosecuted. *Held*, that this is not a final judgment of conviction for an offense, such as is contemplated by law, and can confer no jurisdiction upon this court. Therefore the motion of the Assistant Attorney General to dismiss the appeal must prevail. *Id.*

4. Upon the issue of insanity interposed as a defense to a prosecution for murder, the trial court, after having instructed the jury that every man is supposed to be sane and responsible for his acts, until the contrary is shown to the satisfaction of the jury, instructed them in a subsequent paragraph that the burden of proof was upon the defendant to establish his insanity. The objection urged is that the paragraphs referred to make the presumption of sanity, and the burden of proving insanity too prominent. *Held*, that the objection is without merit, in view of the entire charge. *Massingale v. State*, 181.

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INSANITY—continued.

5. Article 723 of the Code of Criminal Procedure, which provides that "when the defendant is acquitted on the ground of insanity, the jury shall so state in their verdict," is merely directory; and though its substance should be charged by the trial court in all cases involving the issue of insanity, still the omission to so charge, if without apparent injury to the accused, is not material error. *Id.*

6. See the opinion in extenso for the substance of evidence *held* sufficient to establish the insanity of the accused, and, therefore, insufficient to support a conviction for murder. *Id.*

INTENT.

See CHARGE OF THE COURT, 83.

EVIDENCE, 4, 27.

FORGERY, 2.

MURDER, 15.

SWINDLING, 4.

1. See the opinion and the statement of the case for the circumstances under which the trial court, on a trial for murder, should have charged the jury in conformity with article 612 of the Penal Code, which declares that "the instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appears." *Nichols v. State*, 137.

2. Felonious intent is the essential ingredient of theft, and, to constitute that offense, the taking must, in the first instance, have been fraudulent, and if the possession be obtained lawfully, no subsequent appropriation, however fraudulent the intent, will suffice to constitute the taking theft, unless such lawful possession was obtained by means of false pretext, or with the fraudulent intent, at the very time of the taking, to deprive the owner of the value of the property and appropriate the same to the use and benefit of the taker. See the opinion for a requested charge, which, harmonizing with this doctrine, was, in view of the facts in proof, erroneously refused. *Guest v. State*, 235.

3. Note a case in which the trial court should have given in charge to the jury the established doctrine, that, "in cases where there is evidence from which the jury might infer that the taking was not fraudulent, it is the right of the defendant to have them clearly instructed as to the distinction between trespass and theft." *Id.*

4. To constitute assault and battery, unlawful violence must be used upon another, and such violence must be used with the intent to injure the person upon whom it is inflicted. Unaccompanied by such intent, the violence, however unlawful, does not constitute assault and battery. *Ware v. State*, 521.

5. The intent to injure will be presumed when an injury has been inflicted, but when no injury has been inflicted no such presumption will obtain, and the intent must be proved. The proof in this case failing to show the infliction of an injury, and preponderating against the intent to inflict injury, the conviction is against the evidence, and the trial court erred in refusing a new trial. *Id.*

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INTENT—continued.

6. The trial court, in a theft case, charged the jury as follows: "Upon the trial of one charged with the theft of a horse, the possession of the horse without a written bill of sale containing a specific description of the horse is prima facie evidence against the accused that the possession is illegal." Held erroneous, as upon the weight of evidence. *Gilliland v. State*, 524.

7. See the statement of the case for evidence which, tending to show that the act of the accused was neither willfully nor maliciously done, within the legal signification of those terms, was erroneously excluded by the trial court, such evidence being competent upon the question of intent. *Bowers v. State*, 542.

INTERPRETATION OF THE CODES.

See **INSANITY**, 1.

1. The terms "manifestly designed to corrupt the morals of youth," as used in the statute (Penal Code, art. 848), refer to the intention obtaining in the making and publication of the composition; i. e., that the design and purpose of the party making and publishing the composition was to corrupt the morals of youth. The said terms can not be construed to mean that the composition, upon its face, and of itself, must manifestly be of a kind to corrupt the morals of youth. The charge of the trial court, conforming to this construction, was correct. *Smith and Coker v. State*, 1.

2. Subdivision 3 of article 660 of the Code of Criminal Procedure, which provides, in substance, that at the inception of the trial the prosecuting counsel shall state to the jury the nature of the accusation against the defendant, and the facts which are expected to be proved by the State in support thereof, is merely directory, and its disregard is not cause for reversal unless there be cause to apprehend that such disregard resulted injuriously to the rights of the defendant. Such probable injury is not apparent in this case. *Holsey v. State*, 35.

3. The act of May 4, 1882, and that of March 1, 1887, all amendatory of Article 3602 of the Revised Statutes, which relates exclusively to the *hiring out* of county convicts, in no manner affect Article 3597 of the Revised Statutes, which has never been repealed nor changed in any respect. Under the provisions of the last named article, a county convict, against whom a fine and costs have been adjudged, and who, in default of the payment of the same, has been put to labor on the county farm, is entitled to receive a credit against his fine and costs of one dollar per day for each day that he labors; and, when he has labored on the county farm a sufficient length of time to satisfy fine and costs, at the rate of one dollar per day, he is entitled to his discharge. *Ex parte Dampier*, 561..

INTOXICATION IN A PUBLIC PLACE.

"Public place," as that term is used in article 144a of the Penal Code, denouncing a penalty for intoxication in a public place, does not mean a place devoted solely to the uses of the public, but it means a place which,

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INTOXICATION IN A PUBLIC PLACE—continued.

in point of fact, is public, as distinguished from private—a place that is visited by many persons, and that is usually accessible to the neighboring public. A grand jury room, during the session of the grand jury, is, under the above definition, *held* to be a public place; and information so charging is good. See the opinion in extenso on the question. *Mur. chison v. State*, 8.

J.

JAIL BREAKING TO RESCUE PRISONERS.

1. Indictment conforming to No. 138 of Willson's Criminal Forms is sufficient to charge the offense of breaking into a jail to rescue a prisoner, as that offense is defined by article 212 of the Penal Code. *Williams v. State*, 17.

2. The objection urged to the charge in this case was that it is fundamentally defective, in that it did not explain to the jury the meaning of the word "break" as used in the statute defining the offense of breaking into a jail to rescue a prisoner—the defense contending that the definition of that term as it is used in the statute defining burglary is insufficient as applied to the offense of jail breaking; and further, that the term as used in the latter statute, not being specifically defined, it must be construed in the sense in which it is ordinarily understood in common language. *Held*, that, the evidence showing that the appellant entered the lower room of the jail by unbolting an unlocked door, and that he then forced the jailer, at the point of a pistol, to unlock the prison cages, was sufficient to prove such a breaking as is contemplated by the statute. *Id.*

3. See the opinion for evidence *held* to have been properly admitted under the rule that, a conspiracy having been established, the acts and declarations of one conspirator pending the conspiracy, and in furtherance of the criminal design, are admissible against all of the conspirators, and note the statement of the case for evidence *held* sufficient to support a conviction for breaking into a jail to rescue a prisoner. *Id.*

JUDGMENT.

See **THEFT**, 59.

JURISDICTION

1. Upon his arraignment in the criminal district court of Harris county, in which court the indictment was presented, the accused filed his statutory application for a change of venue, which the trial court awarded, and ordered the venue changed to Galveston county. The accused objected that the venue should have been changed to the district court of Fort Bend county, as the nearest to Harris county, and upon arraignment in the criminal district court of Galveston county he pleaded to the jurisdiction of said court. *Held*, that the objection was futile, and the plea to the jurisdiction was properly overruled. Note the opin-

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JURISDICTION—continued.

len for the approval of the ruling in Bohannon's case, 14 Texas Court of Appeals, 371, to the effect that the discretion confided to district judges to change the venue of their own motion to another county within or beyond their own judicial districts is a judicial and not a personal discretion, but one that will not be revised unless it was abused to the prejudice of the accused. *Woodson v. State*, 158.

2. It is a well settled general rule that final judgments upon forfeited bail bonds can not be rendered at the criminal terms of the county courts. But see the opinion in extenso for a summary of the legislation which is held to operate as an exception to the rule in favor of the criminal county court of Titus county, and to specially confer on it jurisdiction to render final judgments upon forfeited bail bonds. *Hutchings v. State*, 249.

3. The certificate of the clerk of the district court to the transfer of the cause to the county court recited that the term of the district court was held in December, 1885, and that the indictment was presented in that court on the eighteenth day of December, 1886. The said indictment alleged that the offense—adultery—was committed on the first day of December, 1884. The defense moved to quash the certificate because, if the certificate was correct, it showed that the indictment was presented more than two years after the commission of the alleged offense, and that, therefore, the prosecution was barred by limitation. The motion and the plea were overruled upon the ground that the recital of 1886 in the certificate was a clerical error, and should have been 1885. *Held*, that the ruling was erroneous; the proper practice would have been to require the proper officer to amend the certificate. In default of such amendment the trial court should have sustained both the motion and the plea to the jurisdiction. *Mitten et al. v. State*, 348.

4. All district judges of this State are authorized by the Constitution to grant the writ of habeas corpus in felony cases, and it is a statutory principle that "every provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy and protect the rights of the person seeking relief under it." Another well settled rule is that "a party's right to the writ does not depend upon the legality or illegality of his original caption, but upon the legality or illegality of his present detention." Under these rules, the judge below had the power to grant and hear the writ of habeas corpus in this case, and this court acquired jurisdiction by appeal; wherefore the State's motion to dismiss the appeal is overruled. *Ex parte Trader*, 393.

5. The relator was indicted for murder in K county. He secured a change of venue to D county, where he was admitted to bail. Upon his release he went to E county, where, under statutory proceedings had in the county court, he was legally declared to be a lunatic, and was ordered to be confined in the State Lunatic Asylum, but subsequently, under the provisions of article 118 of the Revised Statutes, he was placed in the custody of relatives and friends, who entered into bond to care for and restrain him. Subsequently the case against him for murder was called in the district court of D county, and upon his default his bail

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bond was forfeited, and alias capias for his arrest was awarded, which was afterwards executed by the sheriff of E county. Thereupon his custodians, who held him as a lunatic under the authority of the county court of E county, applied to the judge of the district court of E county for the writ of habeas corpus. The writ was granted, but upon the hearing of the same, the said district judge remanded the relator to the custody of the sheriff. Upon this state of case, the custodians of the relator insist, on this appeal, that there is no mode provided by our law by which the sanity of an accused can be inquired into in the district court *before* the commencement of the trial upon the merits of the case under the indictment; and that if insane, or he becomes so after the commission of the offense, he can not be placed upon trial while in such condition—which latter proposition is statutory. But that statute (Penal Code, art. 39) has been held to mean that "when a defendant charged with felony has become insane, a jury should be impaneled to try the issue of insanity before proceeding with the cause upon its merits." Upon this whole case it is *held* that the district judge of E county properly awarded the writ of habeas corpus; but, under the provisions of article 187 of the Code of Criminal Procedure, which provides that "after indictment found, the writ of habeas corpus must be made returnable in the county where the offense has been committed," the same should have been made returnable to the judge of the district court of K county; and this court so orders. *Id.*

58. Jurisdiction is a question addressed to the court alone, and is not a subject for the consideration of the jury. Under this rule, the admission in evidence before the jury of the order changing the venue in the case because of prejudice against the accused, was erroneous. See the opinion in extenso on the question. *Shamburger v. State*, 423.

JURISDICTION OF THE COUNTY COURT.

See JURISDICTION, 2.

JURISDICTION OF THE COURT OF APPEALS.

See JURISDICTION, 4.

JURY LAW.

See FORMER ACQUITTAL AND CONVICTION, 6.
PRACTICE, 84.

1. Under an established rule of practice in this State, no challenge to the array of jurors selected by jury commissioners can be entertained. The record in this case discloses that, at the previous term of the trial court, the term being then limited to three weeks, the court appointed jury commissioners to select jurors to serve at the ensuing term, and the said commissioners selected jurors to serve for three weeks. After the adjournment of the said previous term the Legislature enlarged the term of the trial court to four weeks; and, upon the assembling of court, the trial judge appointed commissioners to select jurors to serve at the next term, and caused them also to draw and select jurors to serve at the

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fourth week of the then term. It was before the jury thus selected to serve during the fourth week that the accused in this case was tried. His challenge to the array was based upon the ground that the jury was not selected by the jury commissioners appointed at the previous term of the court. *Held*, that the challenge was properly overruled. *Williams v. State*, 82.

2. Bill of exceptions reserved to the overruling of a challenge to a juror for cause, is not complete, nor will it be considered by this court if it neither shows that the juror served on the jury, nor that he was challenged peremptorily by the accused, and that an objectionable juror was forced upon the accused after his peremptory challenges were exhausted. *Henning v. State*, 815.

L.**LEADING QUESTIONS.**

See EVIDENCE, 52.

LIMITATIONS.

See JURISDICTION, 3.

LIQUOR TRAFFIC.

1. The Legislature of this State has the power to absolutely prohibit drinking saloons, or saloons to be used in the pursuit of the liquor traffic. This power carries with it the power to regulate the mode and manner, and the circumstances under which such saloons may be conducted, and to surround the right with such conditions, restrictions and limitations as it may deem proper. Under this rule the act of the Legislature requiring the execution of a bond as a condition precedent to the granting of a license to conduct a drinking saloon is constitutional. See the opinion on the question. *Ex parte Bell*, 428.

2. Relator was charged with the offense of pursuing the occupation of a retail liquor dealer without having complied with the license laws. The application for the writ of habeas corpus alleges the refusal of the relator to execute the bond required by law, and prays for relief upon the ground that the conditions of the bond are unconstitutional. *Held*, that the conditions of the bond can not be inquired into in a proceeding of this character, the bond never having been executed; and that the constitutionality of the conditions can be impeached only in a proceeding to enforce the penalties for their infraction. *Id.*

"LOCAL OPTION" LAW.

1. This court held in Sublett's case, 23 Texas Court of Appeals, 309, that the local option law as adopted in Rockwall county, Texas, in January, 1877, was absolutely void, because it was adopted at an election held under an order of the commissioners court of said Rockwall county issued at a meeting of said court subsequent to its first meeting after the petition for such election was filed in said court. This conviction having been had for a violation of the local option law as adopted at said election, it is an absolute nullity. *Wells v. State*, 230.

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"LOCAL OPTION" LAW—continued.

2. It is a settled rule in this State that "the repeal of the local option law by the prescribed mode, pending an appeal from a conviction for its violation while in force, annuls the conviction." This conviction, under this rule, would be a nullity. *Id.*

M.**MAIMING.**

1. To constitute the offense of maiming, the act must be done both willfully and maliciously. *Bowers v. State*, 542.

2. Biting off a portion of a member of a person's body does not necessarily constitute maiming. In all such cases the jury should be left, under proper instructions, to determine whether or not the injury was such as substantially to deprive the injured party of the member. *Id.*

MANSLAUGHTER.

See CHARGE OF THE COURT, 53, 73.

MURDER, 27, 35.

1. See the opinion and the statement of the case for evidence on a murder trial, which, while it did not demand a charge upon the law of self defense, was of such character as to demand a charge upon the law of manslaughter. *Arrellano v. State*, 43.

2. See the opinion and the statement of the case for evidence adduced on a trial for assault with intent to murder *held* not to demand of the trial court a charge upon the law of manslaughter, or upon the law of aggravated assault. *Granger v. State*, 45.

3. The evidence in this case clearly shows that the defendant provoked the difficulty and killed the deceased because of insulting and defamatory language applied by the latter to defendant's daughters, but that he did not do so upon his first meeting with the deceased after being informed of the insulting and defamatory language. *Held*, that the defense of manslaughter, based upon such language, does not arise in the case. *Melton v. State*, 47.

4. The appellant in this case was separately indicted as an accomplice of one Melton in the murder of one Braden. He was convicted upon practically the same evidence, having interposed, as was done on the trial of Melton, the defense of manslaughter. *Held*, that the evidence does not raise the issue of manslaughter, in view of the proof that, though Miller killed Braden for the slander of his daughters, he did not do so upon his first meeting with Braden after being informed of the slanderous language. *Parker v. State*, 61.

5. See the opinion and the statement of the case for evidence on a murder trial *held* not to raise the issue either of manslaughter or of self defense; wherefore the trial court properly refused to instruct the jury upon those questions. *Brooks v. State*, 274; *Thumm v. State*, 667.

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MARKS AND BRANDS.*See THEFT, 84, 58.*

1. While the statute makes a recorded brand admissible as evidence of ownership, the statute does not make it prima facie proof of ownership, and it can be considered only as any other evidence before the jury could be considered. To have given a requested charge upon the effect of such evidence would, therefore, have been to give a charge upon the weight of evidence, which the trial court properly refused to do. *Alexander v. State*, 128.

2. While a recorded brand is evidence of ownership, it and the brand found upon the animal must correspond and be identical, and it must appear on the part of the animal indicated in the record, or the discrepancy in this regard must be satisfactorily explained by the evidence. See the opinion for evidence held to show that the brand found upon the animal was different from the brand set out in the record, and, therefore, being the only evidence on the issue of ownership, and not sufficient upon that issue, is insufficient to support the conviction. *Myers v. State*, 334.

MARRIAGE.*See EVIDENCE, 17.***MURDER.***See CHARGE OF THE COURT, 81.***HABEAS CORPUS, 2.****MANSLAUGHTER, 5.**

1. In 1883 the appellant in this case was tried and convicted in the district court of Wood county for murder of the first degree. On his appeal to this court the judgment of conviction rendered below was affirmed. Subsequent to this affirmance, and before sentence was pronounced, information was filed in the district court setting forth that the accused had become insane. The trial of this issue resulted in a judgment of insanity against the appellant, and he was confined in the State Lunatic Asylum. In the process of time he was discharged from said asylum as sane, and was delivered to the sheriff of Wood county. Thereupon a statutory affidavit, alleging that the appellant had become sane, was filed in the district court, and, upon the hearing of the issue thus presented, the jury found, and the court adjudged, the appellant to be sane. From this judgment this appeal is prosecuted. *Held*, that this is not a final judgment of conviction for an offense, such as is contemplated by law, and can confer no jurisdiction upon this court. Therefore the motion of the Assistant Attorney General to dismiss the appeal must prevail. *Darnell v. State*, 6.

2. The evidence in this case shows clearly that the defendant provoked the difficulty and killed the deceased because of insulting and defamatory language applied by the latter to defendant's daughters, but that he did not do so upon his first meeting with the deceased after being informed of the insulting and defamatory language. *Held*, that

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the defense of manslaughter, based upon such language, does not arise in the case. *Melton v. State*, 47.

3. See the statement of the case for evidence *held* not to raise the issue of self defense, and to be sufficient to support a conviction for murder in the second degree. *Id.*

4. Continuance to secure absent testimony is properly refused if, in view of the evidence adduced on the trial, the absent testimony appears not to be probably true. *Id.*

5. The appellant in this case was separately indicted as an accomplice of one Melton in the murder of one Braden. He was convicted upon practically the same evidence, having interposed, as was done on the trial of Melton, the defense of manslaughter. *Held*, that the evidence does not raise the issue of manslaughter, in view of the proof that, though Miller killed Braden for the slander of his daughters, he did not do so upon his first meeting with Braden after being informed of the slanderous language. *Parker v. State*, 61.

6. The correctness of a charge of the court is to be tested by its sufficiency as a whole. Murder of the first degree was the only grade of homicide presented by the evidence in this case. It was objected that the charge, in applying the law of express malice to the facts in proof, was too general as to the design to kill, inasmuch as it did not limit it to the particular design to kill the deceased. *Held*, that, in view of the charge as a whole, the objection was hypercritical. *Heard v. State*, 103.

7. It is only when the inculpatory proof is wholly circumstantial that the trial court is required to charge the law of circumstantial evidence. *Id.*

8. See the statement of the case for evidence *held* sufficient to support a conviction for murder of the first degree. *Id.*

9. See the opinion and the statement of the case for the circumstances under which the trial court, on a trial for murder, should have charged the jury in conformity with article 612 of the Penal Code, which declares that "the instrument or means by which a homicide is committed are to be taken into consideration in judging of the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appears." *Nichols v. State*, 137.

10. Upon the issue of insanity interposed as a defense to a prosecution for murder, the trial court, after having instructed the jury that every man is supposed to be sane and responsible for his acts, until the contrary is shown to the satisfaction of the jury, instructed them in a subsequent paragraph that the burden of proof was upon the defendant to establish his insanity. The objection urged is that the paragraphs referred to make the presumption of sanity, and the burden of proving insanity too prominent. *Held*, that the objection is without merit, in view of the entire charge. *Massingale v. State*, 181.

11. Article 722 of the Code of Criminal Procedure, which provides

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that "when the defendant is acquitted on the ground of insanity, the jury shall so state in their verdict," is merely directory; and though its substance should be charged by the trial court in all cases involving the issue of insanity, still the omission to so charge, if without apparent injury to the accused, is not material error. *Id.*

12. See the opinion in extenso for the substance of evidence held sufficient to establish the insanity of the accused, and, therefore, insufficient to support a conviction for murder. *Id.*

13. The corpus delicti being the issue under immediate inquiry, the State was permitted to ask its medical witness how, in his opinion, based upon the examination of the body, the injuries thereon were inflicted. The defense objected that the question called for the mere conclusion of the witness as an individual, and not for his opinion as an expert, and that it involved matter upon which the jury were as competent to form an opinion as the witness. The objection was overruled, and the witness was permitted to state his opinion as an individual as to "the only way he could imagine the peculiar injuries were inflicted." Held, that the objection should have been sustained, but that, in view of the other evidence in the case, the question and answer prejudiced no right of the accused; wherefore the error was immaterial. *Steagald v. State*, 207.

14. It is a well settled principle of law that if one willingly enters into a deadly conflict, or provokes the contest, or produces the occasion, in order to have a pretext for killing his adversary or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the conflict. Note the opinion for a state of proof in a murder case to which the rule applies, eliminating the issue of self defense. *Allen v. State*, 216.

15. Intent is a condition of the mind which may be evidenced by outward acts or words spoken. The evidence in this case shows that after the apparent abandonment of the dispute, and after the deceased had put away his pistol, and started to leave, but before he actually left the ground, the accused, displaying his pistol, said: "We had as well settle this thing now," and almost immediately fired upon deceased. The defense claims that, in charging upon the legal consequences of the renewal of the difficulty by the accused, the court erred in failing to instruct the jury that they might inquire into the intent of the accused in renewing it. Held, that the proof in question manifested the intent, and was undisputed; wherefore there was no issue requiring such an instruction. *Id.*

16. Note the opinion for a state of proof under which, in charging the jury upon the right of the accused to act upon the appearance of danger, the trial court did not err in instructing only upon the appearance of *real* danger. *Id.*

17. The evidence on a murder trial disclosed that for a period long anterior to the homicide the deceased was at enmity with the accused; that he had repeatedly, without apparent, probable or reasonable cause, charged the accused with a felony; that he had threatened to kill the

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accused; that he had conspired with one T. to kill the accused, and that, at the time of the homicide, he was acting together with T. in pursuance and furtherance of said conspiracy; that he and T. made an unsuccessful attempt on the night before the homicide to induce other parties to co-operate with them in the murder of the accused on that night, of which effort on the part of the deceased and T. the accused, on the same night, was informed; that on the next morning, immediately after a conference with T., the deceased, armed with a pistol, accosted the accused and again charged him with the felony; that the accused thereupon demanded that the charge be retracted by the deceased, when the deceased placed his right hand to his right side (where his pistol was afterward found), and the accused fired the fatal shot. *Held*, that the evidence fairly raised the issue of self defense, and authorized the court to charge the jury upon that issue; but that, as there was no evidence tending to show that the accused had forfeited his right of self defense by seeking and provoking the difficulty, the charge upon that issue was not authorized by the proof, was prejudicial to the accused, and was, therefore, erroneous. . *Tillery v. State*, 251.

18. The rule prescribing the extent to which a person in emergency is authorized to act upon appearances of danger is as follows: If, from the standpoint of the slayer, it reasonably appeared to him, from the circumstances of the case, that the danger existed, and he acted under the reasonable belief that it did exist, he was justified in defending against it to the same extent, and under the same rules, as if the danger had been real. The charge in this case was erroneous, in that it limited such right of the accused to his *honest belief* that he was in danger, and erroneously made this idea prominent by reiteration. *Id.*

19. The charge of the court is otherwise erroneous in that the instruction relating to the threats uttered by the deceased against the accused is disconnected from that portion of the charge which relates to self defense, whereas it should have formed a part of the instruction on the law of self defense, and should have been given in immediate connection with that issue. *Id.*

20. It was competent for the accused to prove that the deceased had no probable cause to charge him with felony, and did not believe the charge to be true when he made it, but such proof could not be made by the statement of a witness that he investigated the charge of felony made by the deceased against the accused and discovered no evidence to support it, such statement being merely the conclusion of the witness. *Id.*

21. The defense in this case proposed to prove the declarations of T., the co-conspirator of the deceased, made subsequent to the homicide. *Held*, that the proposed proof was properly excluded, it being but hearsay, and not part of the *res gestæ*, nor admissible under the rule that the declarations of one conspirator, pending the conspiracy, are admissible against the other. *Id.*

22. Verdict in the case reads as follows: "We, the jury, find the defendant guilty, as charged in the indictment, of murder in the first

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MURDER—continued.

degree, and assess his punishment at life time in the penitentiary." *Held*, sufficient. *Carroll v. State*, 813.

23. The evidence presenting only the conflicting theories of murder of the first degree on the one hand, and perfect self defense on the other, the trial judge correctly confined his charge to those two issues, and properly refrained from charging upon murder of the second degree and manslaughter. See the statement of the case for evidence held sufficient to support a conviction for murder of the first degree. *Henning v. State*, 815.

24. Declarations or acts of a defendant in his own favor, unless part of the *res gestæ* or of a confession offered by the prosecution, are not admissible for the defense. Under this well established rule the trial court did not err, in this case, in refusing to permit the defendant to prove his statements and declarations made fifteen or twenty minutes after the homicide, and after he had gone twelve hundred yards from the place of the killing. *Lynch v. State*, 850.

25. The evidence in this case disclosed that, at the time of the homicide, the defendant was on his way to the post office in the town of E. As tending to show that his meeting with the deceased was unpremeditated and accidental, the defendant proposed to prove by a witness that, on the Saturday before the Monday on which the homicide occurred, he told the witness that he would meet him at the post office in E. on the said Monday. The trial court excluded the proposed testimony, and charged the jury as follows: "The defendant had the right to go to the post office or any other place he desired to go for a lawful purpose; but if he started to go to or by the house of the deceased merely to get an excuse to kill him, or with the intention of seeking or getting into a fatal rencentre with the deceased, and thus got into the difficulty, then the defendant can not justify the homicide, even though his life was put in peril." *Held*, that waiving the question of the correctness of the ruling of the court in excluding the proposed evidence, the charge of the court was radical error, because it was predicated upon no evidence whatever showing a hostile intention of the defendant in going to or by the house of the deceased. The rule is that, "however correct a principle of law may be in the abstract, it is error to give it in charge if there is a total want of evidence to support the phase of case to which it is applied." *Id.*

26. Article 608 of the Penal Code provides that threats afford no justification for homicide, "unless it be shown that, at the time of the homicide, the person killed, by some act then done, manifested an intention to execute the threat so made." *Held*, that under a proper construction of this statute, the act done must manifest the *immediate* intention to execute the threat so made. It was not error, therefore, that, in his charge upon this subject, the trial judge interpolated the word "immediate" to qualify "intention." See the opinion in extenso on the question. *Id.*

27. If a homicide be committed under the influence of sudden passion by the use of means not in their nature calculated to produce death, and

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in the absence of an intention to kill, the circumstances not showing an evil or cruel disposition, the party killing would not be guilty of culpable homicide, but, self defense apart, would be guilty of some grade of assault and battery. See the opinion for a discussion of the articles of the Penal Code relating to manslaughter. *Thompson v State*, 383.

28. The proof in this case raising the questions whether or not the accused intended to kill the deceased, and whether or not the means used were in their nature calculated to produce death, the trial court should have given to the jury instructions appropriate to those issues. *Id.*

29. If the evidence on a trial for murder raises the issue of self defense, the accused is entitled to a charge upon that issue direct and affirmative in character. See the statement of the case for a charge upon self defense held insufficient because negative. *Id.*

30. The defense interposed to this prosecution was that the deceased fired the fatal shot and killed herself. Upon that issue the trial court charged as follows: "If, from the evidence, you believe that Anna Smith took her own life, and that the fatal shot which deprived her of life was not fired by the defendant, but by her own hand, or by any other means than the act of the defendant, then he is not guilty, and you should so find." Held: That the charge was erroneous because it imposed upon the accused the burden of proving his innocence. The instruction should have been to the effect that if, from all the evidence, the jury entertained a reasonable doubt whether the defendant killed the deceased, or whether the deceased killed herself, they should acquit him. *Shamburger v. State*, 433.

31. In regulating the right to take life in necessary self defense, the code of this State establishes an essential distinction, based upon the nature and severity of the unlawful attack, and discriminates it into two classes. The first class, regulated by article 570 of the Penal Code, comprises all cases in which, from the acts of the assailant or his words coupled therewith, it is reasonably apparent that his intent is to murder or do serious bodily harm, in which case the assailed party may lawfully slay his aggressor while he is committing the offense, or when he has done some act evidently showing his intention to commit it. The second class, regulated by article 572 of the Penal Code, comprises those cases in which the purpose or intent reasonably indicated by the unlawful and violent attack is other than those above mentioned. The proof on this, as on the former trial of this case, shows that, if the deceased made any attack on the accused, it was a murderous attack which came clearly within the provisions of article 570 of the Penal Code, and there was no evidence whatever tending to show a milder attack. In this state of the proof, the trial court erred in charging the provisions of article 572, because such charge, being unauthorized by the proof, was calculated to confuse and mislead the jury. Note the opinion for the approval on the subject of Orman's case, 22 Texas Court of Appeals, 604, and Kendall's case, 8 Texas Court of Appeals, 569. *Orman v. State*, 495.

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MURDER—continued.

32. Any condition or circumstance which is capable of creating sudden passion, rendering the mind incapable of cool reflection, may be "adequate cause," and where the evidence shows a number of conditions or circumstances tending either singly or collectively to show "adequate cause," the jury should not be restricted by the charge to a consideration of a single condition or circumstance, but should be directed to consider them all in determining the question of "adequate cause." The proof in this case shows (besides insulting language used by the deceased about the mother and sister of the defendant) that the deceased, for several hours preceding the killing, was searching for the defendant with the avowed intention of killing him on sight, and that he was armed with a pistol with which he declared his intention to kill the defendant. *Held:* That, in confining the "adequate cause" to the insulting language, and in failing to submit to the jury whether the said acts and threats of the deceased (which were proved to have been communicated to the defendant), of themselves, or in connection with the insulting language, were not "adequate cause," the charge of the court on the issue of manslaughter was erroneous. *Id.*

33. See the statement of the case for a charge of the court on the principle of "cooling time," *held*, erroneous because not authorized by the proof. *Id.*

34. Indictment is sufficient to charge a murder by express malice aforethought, and, therefore, murder of the first degree, if it charges that the accused "did, with malice aforethought, kill the deceased [naming him] by shooting him with a pistol." *Banks v. State*, 559.

35. When the adequate cause relied upon to reduce murder to manslaughter is insulting language by the person slain towards the female relative of the slayer, it is error for the trial court to give in charge to the jury the provisions of article 594 of the Penal Code, to the effect that the provocation must arise at the time of the killing, and that the passion must not be the result of a previous provocation. On the contrary, the jury in such cases should be instructed that the time intervening between the slayer's appraisal of the insult and his first meeting with deceased is not a material consideration, provided the adequate cause be shown, and the state of the slayer's mind, predicated thereon, did actually exist at the time of the killing. *Williams v. State*, 637.

36. See the statement of the case for evidence *held* sufficient to support a conviction for murder in the second degree. *Thumm v. State*, 667.

N.

NEWLY DISCOVERED EVIDENCE.

See ASSAULT AND BATTERY, 5.

NEW TRIAL, 5.

NEW TRIAL.

1. Sub-division 6 of article 560 of the Code of Criminal Procedure provides that though a continuance shall not be granted as a matter

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NEW TRIAL—*continued.*

of right, still, if the application therefor be overruled and the defendant be convicted, a new trial should be granted, if it appears upon the trial that the evidence of the absent witnesses was material, and that the facts set forth in the application were probably true. *McAdams v. State*, 86.

2. The rule which should govern the action of the trial court in passing, first, upon an application for a continuance, and subsequently upon a motion for new trial, has heretofore been stated by this court as follows: "If there is such conflict between the inculpatory facts and those set forth in the application as to render it improbable that the facts stated in the application are material and probably true, the continuance should be refused; and hence, a new trial based thereupon should also be refused. There must, however, not only be such a conflict, but the inculpatory facts must be so strong and convincing as to render the truth of the facts set forth in the application improbable." See the opinion for the substance of evidence set forth in an application for a continuance, which, the continuance being refused, demanded of the trial court, in view of the evidence on the trial, the award of a new trial. *Id.*

3. An accused, resting his demand for a new trial upon disputed facts, is not entitled to a new trial in order to produce testimony that is cumulative of his evidence on the trial, but the doctrine of cumulative facts does not apply to applications for continuance. But note that the facts set out in the application for continuance in this case are not merely cumulative. *Id.*

4. However complete may be the diligence used to secure the presence of absent witnesses, as shown by application for continuance, the refusal of the continuance is not ground for new trial if the absent testimony in the light of the evidence adduced on the trial is not probably true. *Collins and Lindly v. State*, 141.

5. See the statement of the case for evidence sufficient to support a conviction for assault with intent to rape, but also for newly discovered evidence held to have demanded of the trial court the award of a new trial. *McCleaveland v. State*, 202.

6. See the statement of the case for the substance of evidence set out in a motion for new trial, which, though not strictly newly discovered, in the light of the evidence on the trial entitled the defendant to a new trial. *Roy v. State*, 369.

7. See the opinion in extenso, and the statement of the case for proof developed on a trial for horse theft, which, raising the defense of mistake of fact on the part of the accused in asserting claim to the animal alleged to have been stolen, demanded of the trial court the submission of that issue to the jury under proper instructions. Note also that, in view of the proof, the trial court having refused the accused a continuance, should have awarded him a new trial. *Criswell v. State*, 606.

NON-AGE.

See EVIDENCE, 63.

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NOTICE.

It is not a sufficient objection to the proceedings in a *scire facias* case that the trial court permitted such an amendment of the *scire facias* without notice to the principal in the bond. Note the opinion for the distinction between this and Collins's case, 16 Texas Court of Appeals, 274. *Hutchings v. State*, 242.

O.**OBSTRUCTION OF PUBLIC ROADS.**

The evidence in this case showing that the road obstructed was not located in accordance with the order of the commissioners court establishing it, and that, therefore, it was not a public road; and that, whether a public or private road, it was obstructed by the accused, not willfully, but with the belief, and with good cause to believe, that he had the legal right to obstruct it, does not support this conviction. *Owen v. State*, 201.

OWNERSHIP.

See **FACT CASE**, 19,
THEFT, 34, 40.

P.**PARDON.**

See **EXECUTIVE PARDON**.

PENALTY.

The penalty assessed by the verdict in this case was a fine of twenty dollars, but the same, by inadvertence, is recited in the judgment as twenty-five dollars. This court reforms the judgment to conform to the verdict of the jury. *Robinson v. State*, 4.

PERJURY.

1. The prosecution in this case was for perjury committed upon the trial of one C. for burglary. The State was permitted to prove the testimony of the appellant before the grand jury upon the investigation of the charge against C., and his subsequent contradictory evidence upon the trial of C., and also his statements respecting the inducements under which he testified as he did upon the trial. *Held*, that the evidence was legitimate and was properly admitted. *Littlefield v. State*, 167.

2. The trial court having admitted in evidence the indictment against C. for burglary, and the judgment rendered upon that trial, should, in the charge to the jury, have limited and restricted the jury to the legitimate purpose of such testimony. This omission in the charge was fatal error. *Id.*

3. See the opinion in extenso for the substance of an indictment *held* sufficient to charge the offense of perjury. *Brown v. State*, 170.

4. The prosecution in this case was for perjury, alleged to have been committed by the accused when he testified at the trial of one Williams

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PERJURY—continued.

for assault to murder. Upon the introduction of one Moore as a witness for the defense, in the present case, the State offered, and was permitted, over the defendant's objection, to read in evidence an indictment then pending against the said Moore, wherein the said Moore was charged with perjury upon the same trial as that in which the defendant is charged to have committed perjury. *Held* that, though the indictment was not admissible to impeach Moore's competency as a witness, it was admissible as matter going directly to his credibility, and as tending to show a motive for his testimony in this particular case. Being admissible for these purposes, it was not incumbent on the trial judge, in his charge, to limit and restrict it, inasmuch as it did not tend to exercise a wrong, undue or improper influence upon the jury as to the main issue. *Id.*

5. See the statement of the case for evidence which, though conflicting, satisfied the jury, whose province it was to determine its weight and credibility, and is *held* sufficient to support a conviction for perjury. *Id.*

6. It was not error to permit the State in a trial for perjury, to read in evidence the complaint filed in the cause upon the trial of which the perjury was alleged to have been committed, inasmuch as such evidence was competent to prove that the alleged false statements were made in the judicial proceeding and before the court alleged in the indictment, but, having admitted such evidence, the trial court, in its charge, should have limited its effect to such purpose only. *Higgenbotham v. State*, 505.

7. Under the rule of the common law, and under the statutory law of many of the States of the Federal Union, a false statement under oath, made in the progress of a judicial proceeding, can not be assigned as perjury, unless the tribunal sitting in judgment upon the proceeding not only had jurisdiction of the matter, but when its jurisdiction had actually attached. But, under the Constitution and the statutory laws of this State, the rule is more comprehensive, and a false statement may be assigned for perjury if it was made in the course of a judicial proceeding before a court of competent jurisdiction over the subject matter of the proceeding, although its jurisdiction had not actually attached. See the opinions, both on the original hearing and on the motion for rehearing, for an elaborate discussion of the principles underlying the rule. *Anderson v. State*, 705.

8. The perjury assigned in this case was the alleged false testimony given by the accused upon the trial, in a justice's court, of one Green Wright, upon a charge of carrying a pistol. The prosecution against Wright was based upon a complaint and information, the former of which is required by law to be verified by the oath of some credible person. Evidence was introduced upon this trial which tended strongly to show that the complaint under which the prosecution of Wright was had was not sworn to; and upon the theory that, if the complaint was not sworn to, the jurisdiction of the justice of the peace had not attached in the Wright case, a false statement by accused in that

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PERJURY—continued.

proceeding was not assignable as perjury, the accused asked the trial court to charge the jury that, if they had a reasonable doubt that the complaint was sworn to, they should acquit. *Held* that, under the rule first announced, the trial court did not err in refusing the special charge. *Id.*

9. A conviction for perjury, to be legally obtained, must be had upon the testimony of at least two credible witnesses, or that of one credible witness strongly corroborated by other evidence. See the statement of the case for evidence which, though conflicting, is *held* sufficient to support the conviction for perjury. *Id.*

PLEA.

See JURISDICTION, 8.

Unless the transcript on appeal shows that the accused pleaded to the information against him, or that a plea of not guilty was entered for him by order of the court, a conviction will be set aside. *Jefferson v. State*, 535.

PLEADING.

See INDICTMENT, 1.
INFORMATION, 9

JURISDICTION
THEFT, 11.

POSSESSION.

See THEFT, 7, 14.

1. "Actual care, control and management" of the alleged stolen property is, under our statute defining theft, such possession as will support an allegation of possession. *Tinney v. State*, 112.

2. The indictment in this case alleged both the ownership and possession in D. The proof showed that, though the animal belonged to D., one H. found it on his premises, took it up, and staked and fed it on his premises, and proclaimed his intention to stray it. But, before H. could complete the estrayal of the said animal, it was stolen from the stake on his premises. *Held*, that the proof shows that H. had the "care, control and management" of the horse, which constituted possession; and therefore the variance between the allegation and proof of possession is fatal to the conviction. *Id.*

POSSESSION OF RECENTLY STOLEN PROPERTY.

See CHARGE OF THE COURT, 43, 68.

1. Possession of stolen property by the accused, however recent that possession may be, if explained and accounted for, and shown by the evidence to be lawful, will afford against the accused no legal presumption of guilt of theft. See the opinion for the substance of evidence *held* insufficient to support a conviction for the theft of a mare. *Bean v. State*, 11.

2. To warrant an inference of guilt of theft from the circumstance of possession of recently stolen property, such possession must be personal and exclusive; must be unexplained, and must involve a distinct and

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POSSESSION OF RECENTLY STOLEN PROPERTY—*continued.*

conscious assertion of property by the defendant. See the statement of the case for evidence which, under this rule, is *held* insufficient to support a conviction for burglarious theft. *Field v. State*, 423.

POWER OF LEGISLATURE.

1. The Legislature of this State has the power to absolutely prohibit drinking saloons, or saloons to be used in the pursuit of the liquor traffic. This power carries with it the power to regulate the mode and manner, and the circumstances under which such saloons may be conducted, and to surround the right with such conditions, restrictions and limitations as it may deem proper. Under this rule the act of the Legislature requiring the execution of a bond as a condition precedent to the granting of a license to conduct a drinking saloon is constitutional. See the opinion on the question. *Ex parte Bell*, 428.

2. Relator was charged with the offense of pursuing the occupation of a retail liquor dealer without having complied with the license laws. The application for the writ of habeas corpus alleges the refusal of the relator to execute the bond required by law, and prays for relief upon the ground that the conditions of the bond are unconstitutional. *Held*, that the conditions of the bond can not be inquired into in a proceeding of this character, the bond never having been executed; and that the constitutionality of the conditions can be impeached only in a proceeding to enforce the penalties for their infraction. *Id.*

PRACTICE.

See ADULTERY, 4.

ASSAULT TO RAPE, 1, 3.

BRANDS.

CHARGE OF THE COURT, 1, 2, 16,
40.

CONTINUANCE, 11.

CORPUS DELICTI.

EVIDENCE, 25, 75, 81, 84.

1. Article 960 of the Code of Criminal Procedure of this State provides that "when, upon the trial of an issue of insanity, it is found that the defendant is sane, the judgment of conviction shall be enforced as if no such inquiry had been made." The effect of this statute is to declare that the judgment of the trial court adjudging the defendant to be sane shall be conclusive of that issue, and that, thereupon, the judgment of conviction shall be enforced. *Darnell v. State*, 6.

2. Appeal to this court can be prosecuted only after the trial and conviction of the accused in the lower court for an offense and the entry of final judgment against him, which must appear in the record. A judgment rendered in an ex parte proceeding in the trial court, upon the issue of insanity of the accused, after his trial and conviction of an offense, is not such a judgment as will support an appeal to this court. *Id.*

3. In 1888 the appellant in this case was tried and convicted in the district court of Wood county for murder of the first degree. On his

GAMING, 1.

INDICTMENT, 3.

JURISDICTION, 3.

POSSESSION, 2.

PRACTICE IN COURT OF APPEALS,
1, 3.

THEFT, 23, 24, 40.

VARIANCE.

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PRACTICE—continued.

appeal to this court the judgment of conviction rendered below was affirmed. Subsequent to this affirmance, and before sentence was pronounced, information was filed in the district court setting forth that the accused had become insane. The trial of this issue resulted in a judgment of insanity against the appellant and he was confined in the State Lunatic Asylum. In the process of time he was discharged from said asylum as sane, and was delivered to the sheriff of Wood county. Thereupon a statutory affidavit, alleging that the appellant had become sane was filed in the district court, and, upon the hearing of the issue, thus presented, the jury found, and the court adjudged, the appellant to be sane. From this judgment this appeal is prosecuted. *Held*, that this is not a final judgment of conviction for an offense, such as is contemplated by law, and can confer no jurisdiction upon this court. Therefore the motion of the Assistant Attorney General to dismiss the appeal must prevail. *Id.*

4. It is only when the error in the charge of the court is fundamental or when, in view of all the facts in the case, it was calculated to injure the rights of the defendant, that the charge, in the absence of a proper bill of exceptions or of a requested instruction, will be revised. *Williams v. State*, 17.

5. The objection urged to the charge in this case was that it is fundamentally defective, in that it did not explain to the jury the meaning of the word "break" as used in the statute defining the offense of breaking into a jail to rescue a prisoner—the defense contending that the definition of that term as it is used in the statute defining burglary is insufficient as applied to the offense of jail breaking; and further, that the term as used in the latter statute, not being specifically defined, it must be construed in the sense in which it is ordinarily understood in common language. *Held*, that, the evidence showing that the appellant entered the lower room of the jail by unbolting an unlocked door, and that he then forced the jailer, at the point of a pistol, to unlock the prison cages, was sufficient to prove such a breaking as is contemplated by the statute. *Id.*

6. See the opinion for evidence *held* to have been properly admitted under the rule that, a conspiracy having been established, the acts and declarations of one conspirator pending the conspiracy, and in furtherance of the criminal design, are admissible against all of the conspirators, and note the statement of the case for evidence *held* sufficient to support a conviction for breaking into a jail to rescue a prisoner. *Id.*

7. The action of the trial court in refusing an application for continuance will not be revised unless exception to such action is presented by proper bill. *Id.*

8. Under an established rule of practice in this State, no challenge to the array of jurors selected by jury commissioners can be entertained. The record in this case discloses that, at the previous term of the trial court, the term being then limited to three weeks, the court appointed jury commissioners to select jurors to serve at the ensuing term, and the

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PRACTICE—*continued.*

said commissioners selected jurors to serve for three weeks. After the adjournment of the said previous term the Legislature enlarged the term of the trial court to four weeks; and, upon the assembling of court, the trial judge appointed commissioners to select jurors to serve at the next term, and caused them also to draw and select jurors to serve at the fourth week of the then term. It was before the jury thus selected to serve during the fourth week that the accused in this case was tried. His challenge to the array was based upon the ground that the jury was not selected by the jury commissioners appointed at the previous term of the court. *Held*, that the challenge was properly overruled. *Id.*

9. Violent language used in argument by the prosecuting counsel, if the same was called forth and demanded by remarks of counsel for the defense, can not be held to constitute such an abuse of the privilege of argument as will vitiate a conviction. *Id.*

10. The rule obtains in this State that "whenever there is reason to apprehend that injury may have resulted to the defendant, especially in a case of felony, from a failure to observe directions given the court by the Legislature, the judgment of conviction will be reversed." *Holsey v. State*, 35.

11. Subdivision 3 of article 660 of the Code of Criminal Procedure, which provides, in substance, that at the inception of the trial the prosecuting counsel shall state to the jury the nature of the accusation against the defendant, and the facts which are expected to be proved by the State in support thereof, is merely directory, and its disregard is not cause for reversal unless there be cause to apprehend that such disregard resulted injuriously to the rights of the defendant. Such probable injury is not apparent in this case. *Id.*

12. An inquiry as to character must be limited to the general reputation of the person impugned in the community of his residence or where he is best known, and the witness must speak from his knowledge of that general reputation, and not from his own individual opinion. If the defendant voluntarily puts his character in issue, the prosecution is entitled to rebutting evidence if it can produce it, but such evidence must be confined to the general reputation of the defendant, and can not be extended to particular acts. There is no rule of law which will permit an inquiry into the character of the defendant's associates, and in permitting such inquiry in this case the trial court erred. *Id.*

13. Fraudulent intent in the taking of the alleged stolen property must be shown in order to authorize a conviction for theft, and it devolves upon the trial court to so instruct the jury affirmatively and directly. *Id.*

14. The appellant in this case was separately indicted as an accomplice of one Melton in the murder of one Braden. He was convicted upon practically the same evidence, having interposed, as was done on the trial of Melton, the defense of manslaughter. *Held*, that the evidence does not raise the issue of manslaughter, in view of the proof that, though Melton killed Braden for the slander of his daughters, he did not

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PRACTICE—continued.

do so upon his first meeting with Braden after being informed of the slanderous language. *Parker v. State*, 61.

15. Continuance to secure absent testimony is properly refused if, in view of the evidence on the trial, the absent testimony was not probably true, or, if not probably untrue, it was, in the light of the other evidence, immaterial to any issue in the case. *Id.*

16. Article 755 of the Code of Criminal Procedure provides that "the rule that the party introducing a witness shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any other manner except by proving the bad character of the witness." *Held*, that before this rule can be applied, the witness must have stated some fact in evidence which was injurious to the cause of the party in whose behalf he was called to testify; and it is not enough that he merely made a statement different from that which the party had reason to and did believe he would make. *Bennett v. State*, 73.

17. The rule obtains in this State that if a party be bona fide surprised at unexpected testimony of his witness, he may be permitted to interrogate his witness as to his previous declarations inconsistent with his testimony,—the object being to test the witness's recollection, and to enable him, if mistaken, to review his evidence. Such corrective testimony is also admissible to explain the attitude of the party calling the witness; but if the sole object of the proffered testimony be to discredit the witness, it will not be received. *Id.*

18. While a full pardon, granted by competent authority, to one who has been convicted of felony, removes the legal odium from such person, and qualifies him to testify as a witness in the courts of this State, it does not remove the question of his credibility from the consideration of the jury; nor will it operate to prevent opposing counsel from urging in argument that, notwithstanding such pardon, the witness, by reason of his conviction for felony, is entitled to no credit. The trial court did not err in refusing to restrain the State's counsel in such argument. *Id.*

19. To render a confession inadmissible upon the ground that it was induced by the promise of some benefit to the accused, such promise must be positive, and must be made or sanctioned by some one in authority, and be of such character as would be likely to influence the accused to speak untruthfully. The confession of an accused is not rendered inadmissible because it was made under the influence alone of fear of legal punishment. *Gentry v. State*, 80.

20. The trial court in this case submitted to the jury the competency of the confession as evidence, and in the same connection charged them that it could be considered as evidence if the accused made statements therein relating to the commission of the offense which were otherwise found to be true. *Held*, that the charge was erroneous, because unauthorized by any evidence in the case; and that the error, though immaterial, necessitates the reversal of the judgment, inasmuch as exception was reserved at the time of the trial. *Id.*

21. Subdivision 6 of article 560 of the Code of Criminal Procedure

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provides that, though a continuance shall not be granted as a matter of right, still, if the application therefor be overruled and the defendant be convicted, a new trial should be granted if it appears upon the trial that the evidence of the absent witnesses was material, and that the facts set forth in the application were probably true. *McAdams v. State*, 86.

22. The rule which should govern the action of the trial court in passing, first, upon an application for a continuance, and subsequently upon a motion for new trial, has heretofore been stated by this court as follows: "If there is such conflict between the inculpatory facts and those set forth in the application as to render it improbable that the facts stated in the application are material and probably true, the continuance should be refused; and hence a new trial based thereupon should also be refused. There must, however, not only be such a conflict, but the inculpatory facts must be so strong and convincing as to render the truth of the facts set forth in the application improbable." See the opinion for the substance of evidence set forth in an application for a continuance, which, the continuance being refused, demanded of the trial court, in view of the evidence on the trial, the award of a new trial. *Id.*

23. An accused, resting his demand for a new trial upon disputed facts, is not entitled to a new trial in order to produce testimony that is cumulative of his evidence on the trial; but the doctrine of cumulative facts does not apply to applications for continuance. But note that the facts set out in the application for continuance in this case are not merely cumulative. *Id.*

24. The correctness of a charge of the court is to be tested by its sufficiency as a whole. Murder of the first degree was the only grade of homicide presented by the evidence in this case. It was objected that the charge, in applying the law of express malice to the facts in proof, was too general as to the design to kill, inasmuch as it did not limit it to the particular design to kill the deceased. *Held*, that, in view of the charge as a whole, the objection was hypercritical. *Heard v. State*, 103.

25. It is only when the inculpatory proof is wholly circumstantial that the trial court is required to charge the law of circumstantial evidence. *Id.*

26. An indictment for swindling by false pretense should positively and clearly aver the commission of the acts by the accused. If a written instrument enters into the offense as matter of inducement, the said instrument should be set out, as in forgery. See the statement of the case for an indictment *held* insufficient to charge the offense of swindling by false pretense; wherefore the motion in arrest of judgment should have prevailed. *Dwyer v. State*, 132.

27. However complete may be the diligence used to secure the presence of absent witnesses, as shown by application for continuance, the refusal of the continuance is not ground for new trial if the absent testimony, in the light of the evidence adduced on the trial, is not probably true. *Collins and Lindly v. State*, 141.

28. Under the provisions of article 772 of the Code of Criminal Procedure, the written testimony of a witness, taken at the examining trial

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of the accused, can be read in evidence "when, by reason of age or bodily infirmity, such witness can not attend." Under this rule it is not essential that the bodily infirmity shall amount to a permanent disability. As a predicate for the admission of the written testimony on the examining trial, it was shown in this case that the witness was at home, in another county, forty miles distant, where, at the time of the trial, and for months before, he had been confined to his house from the effects of an attack of measles, which had destroyed one of his eyes and left him a chronic invalid, with constant pains in his head and palpitation of the heart. *Held*, that in admitting the written testimony in evidence the trial court did not err. *Id.*

29. To the rule that a confession is inadmissible if made by an accused when in arrest, unless made after warning that the same will be used as evidence against him, there is an exception when the confession comprehends a statement of facts "found to be true, and which conduce to establish his guilt." Inasmuch as the confession of Lindly, which was made during his confinement in jail, and in the absence of Collins, though made without warning, comprehended a statement of facts found to be true, and which conduced to the establishment of guilt, it was, upon the joint trial of Collins and Lindly, admissible as against Lindly, but not as against Collins. The trial court, however, instructed the jury that the confessions could not be considered as evidence against Collins: wherefore it is *held* that the action of the court upon the question raised on the confession was correct. *Id.*

30. In order to constitute the accused a principal in the crime of theft, it devolves upon the State to establish his complicity in the original taking. In view of the evidence in this case, and of the refusal of a charge based upon it, the failure of the trial court to apply this doctrine to the case, in so far as it concerned the defendant Lindly, was error. See the statement of the case for evidence *held* to support the conviction for theft of the defendant Collins, but insufficient to support the conviction of Lindly. *Id.*

31. Upon his arraignment in the criminal district court of Harris county, in which court the indictment was presented, the accused filed his statutory application for a change of venue, which the trial court awarded, and ordered the venue changed to Galveston county. The accused objected that the venue should have been changed to the district court of Fort Bend county, as the nearest to Harris county, and upon arraignment in the criminal district court of Galveston county he pleaded to the jurisdiction of said court. *Held*, that the objection was futile, and the plea to the jurisdiction was properly overruled. Note the opinion for the approval of the ruling in Bohannon's case, 14 Texas Court of Appeals, 271, to the effect that the discretion confided to district judges to change the venue of their own motion to another county within or beyond their own judicial districts is a judicial and not a personal discretion, but one that will not be revised unless it was abused to the prejudice of the accused. *Woodson v. State*, 153.

32. The general rule is that the best evidence by which a fact can

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be proved must be produced or its absence be accounted for before secondary evidence can be resorted to. But an exception to this rule is that the official character of an alleged public officer need not be proved by his commission or other written evidence of the officer's right to act as such, except in an issue directly between the officer and the public. The trial court did not err in permitting a State's witness to testify that he was the justice of the peace who administered the oath upon which the false swearing was predicated. *Id.*

33. Bills of exception reserved to the action of the trial court excluding testimony will not be considered by this court unless they disclose the relevancy and materiality of the excluded evidence. *Id.*

34. The charge of the court in this case was deficient in failing to instruct the jury as to the legal meaning of the terms "willful" and "deliberately," but, inasmuch as no exception was reserved to the omission, and it was practically supplied by a special instruction given to the jury, the omission is *held* to have been without prejudice to the accused, and the charge sufficient in substance. *Id.*

35. Conditional pardon will not restore to one convicted of a felony competency to testify as a witness in the courts of this State. *Dudley v. State*, 163.

36. The State having introduced a conditionally pardoned convict as a witness against the defendant, the latter, for the purpose of assailing the credibility of the witness, proposed to read in evidence the judgment of conviction against him for felony, which, upon objection by the State, was excluded. *Held*, that the ruling was error. *Id.*

37. It is essential to the validity of a conviction for adultery that the evidence show affirmatively that one of the parties to the adulterous acts was married and had, at the time of the alleged adultery, a spouse other than the party with whom the adultery was charged. *Webb v. State*, 164.

38. The mere opinion of witnesses that a certain woman was the wife of the male charged with the adultery is not sufficient to establish the fact of marriage. *Id.*

39. An *actual living together*, as man and wife, of emancipated slaves, at the time when the Constitution of 1869 took effect, would constitute a legal marriage between said parties. But note that the evidence in this case fails to establish such a living together of the accused male and his alleged wife, or that they were emancipated slaves when said Constitution took effect; wherefore the evidence is insufficient to prove the legal marriage of the accused, and therefore insufficient to support a conviction for adultery. *Id.*

40. The prosecution in this case was for perjury committed upon the trial of one C. for burglary. The State was permitted to prove the testimony of the appellant before the grand jury upon the investigation of the charge against C., and his subsequent contradictory evidence upon the trial of C., and also his statements respecting the inducements under which he testified as he did upon the trial. *Held*, that the evidence was legitimate and was properly admitted. *Littlefield v. State*, 167.

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41. Indictment for burglary by force, threats and fraud, although it fails to charge that the offense was committed by day or by night, will support a conviction if the proof shows that the entry was effected by actual force in the night time applied to the building. Note the approval of Carr's case, 19 Texas Court of Appeals, 635, and Martin's case, 21 Texas Court of Appeals, 1. *Buchanan v. State*, 195.

42. It is not essential that the State, on a trial for burglary, shall prove the non-consent of the owner, occupant or other authorized person to the entry. *Id.*

43. Bills of exception to the exclusion of testimony must disclose the relevancy and materiality of the proposed testimony in order to receive the attention of this court. *Id.*

44. The occupancy of the owner's agent or clerk during the temporary absence of the owner is, in law, the occupation of the owner. The trial court, therefore, did not err in refusing to charge the jury to acquit if the evidence showed that the house, when entered, was in charge of one P., and not of S., the alleged owner. *Id.*

45. The evidence in this case showing that the road obstructed was not located in accordance with the order of the commissioners court establishing it, and that, therefore, it was not a public road; and that, whether a public or private road, it was obstructed by the accused, not willfully, but with the belief, and with good cause to believe, that he had the legal right to obstruct it, does not support this conviction. *Owen v. State*, 201.

46. Charge of the court upon a trial for assault to rape instructed the jury that "the law provides that any person shall assault a woman with the intent to commit the offense of rape, he shall be punished," etc.; the error complained of being the omission of the word "if" between the words "that" and "any." *Held*, that the omission is immaterial in view of another paragraph of the charge which properly defines the offense. *McCleaveland v. State*, 202.

47. The court charged the jury that "the use of any unlawful violence offered to another with intent to injure," etc., the objection urged being to the use of the word "offered" instead of the statutory words "upon the person," in defining assault and battery. The defenses interposed were alibi, fabricated accusation, and that the acts charged against the accused, if proved, would not show an intent on his part to rape. Whether or not the acts of the defendant constituted an assault and battery was not an issue of the case, and, under such circumstances, it is *held* that the substitution of the word "offered" for the words "upon the person" was not error to the prejudice of the accused. *Id.*

48. However erroneous a charge of the court may be, if it redounds to the benefit of the accused he can not be heard to complain. *Id.*

49. This court held in Sublett's case, 23 Texas Court of Appeals, 309, that the local option law as adopted in Rockwall county, Texas, in January, 1877, was absolutely void, because it was adopted at an election held under an order of the commissioners court of said Rockwall county issued at a meeting of said court subsequent to its first meeting after

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the petition for such election was filed in said court. This conviction having been had for a violation of the local option law as adopted at said election, it is an absolute nullity. *Wells v. State*, 280.

50. It is a settled rule in this State that "the repeal of the local option law by the prescribed mode, pending an appeal from a conviction for its violation while in force, annuls the conviction." This conviction, under this rule, would be a nullity. *Id.*

51. The object of the scire facias in a criminal case is to bring the sureties into court to show cause why judgment should not be entered against them upon the bond already forfeited, and it is not essential that the writ shall embrace the principal in the bond. *Hutchings v. State*, 242.

52. The rules which regulate and control the amendment of a citation and petition in a civil case apply to a scire facias case. Moreover, it is essential that the scire facias, in cases like the present, should show on its face, either by original or amended averment, that there is, in fact, no actual, though there may be an apparent, variance in the names of the parties to the bond. The trial court did not err in permitting the scire facias to be amended to show that the John McCulloch described therein was the W. J. McCulloch who signed as the principal in the forfeited bond. *Id.*

53. It is not a sufficient objection to the proceedings in a scire facias case that the trial court permitted such an amendment of the scire facias without notice to the principal in the bond. Note the opinion for the distinction between this and Collins's case, 16 Texas Court of Appeals, 274. *Id.*

54. It is a well settled general rule that final judgments upon forfeited bail bonds can not be rendered at the criminal terms of the county courts. But see the opinion in extenso for a summary of the legislation which is held to operate as an exception to the rule in favor of the criminal county court of Titus county, and to specially confer on it jurisdiction to render final judgments upon forfeited bail bonds. *Id.*

55. The indictment charged the possession and ownership of the alleged stolen horse to be in one J. C. B. The proof showed that the animal was taken by the accused from a place at which one Bull had hopped it by direction of D. H. B., who had borrowed the horse from J. C. B. *Held*, that the proof established the possession in D. H. B., and that the variance between the allegation and proof on the issue of possession is fatal to the conviction. *Conner v. State*, 245.

56. The proof showed that, for the purpose of detecting the accused in the very act of theft, the horse was hopped with the expectation and the intent that defendant would take him. It was contended by the defense that the proof established a taking with the consent of the owner. *Held*, that the position is without merit, as the owner in no way suggested the theft to the accused nor induced him to commit it. *Id.*

57. Neither asportation nor actual manual possession of the property is, under our code, essential to constitute theft. *Id.*

58. It was competent for the accused to prove that the deceased had

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no probable cause to charge him with felony, and did not believe the charge to be true when he made it, but such proof could not be made by the statement of a witness that he investigated the charge of felony made by the deceased against the accused and discovered no evidence to support it, such statement being merely the conclusion of the witness. *Id.*

59. The defense in this case proposed to prove the declarations of T., the co-conspirator of the deceased, made subsequent to the homicide. *Held*, that the proposed proof was properly excluded, it being but hearsay, and not part of the *res gestæ*, nor admissible under the rule that the declarations of one conspirator, pending the conspiracy, are admissible against the other. *Id.*

60. The ruling of the trial court refusing a continuance will not be revised by this court unless, in addition to its other requisites, the application shows the relevancy and materiality of the absent testimony. *Brooks v. State*, 274.

61. Proof of deadly threats made by the deceased against the accused, and that the deceased was a violent and dangerous character, and that the threats and the character of the deceased were known to the accused at the time of the homicide, can afford no justification for homicide without proof that, at the time of the homicide, the deceased did some act indicating a present intention to kill the accused or do him serious bodily harm. Neither the evidence adduced on the trial nor that foreshadowed in the application for continuance laid a predicate for proof of threats in this case; wherefore a continuance was properly refused. *Id.*

62. Attempt to rape, as that offense is defined by article 535 of the Penal Code, is an offense distinct from rape or assault with intent to rape, and comprehends elements different from those which combine to constitute either of those offenses. *Melton v. State*, 284.

63. The indictment in this case charged, in the first count, an assault with intent to commit rape, and in the second count an attempt to commit rape. The State elected to prosecute upon the second count, and the conviction was had under that count. One of the grounds relied upon in the motion to quash the second count was that there can be no conviction for attempt to rape except on a trial for the specific offense of rape. *Held* that the motion to quash was properly overruled, an attempt to rape being a substantive offense for which an indictment may be found and a conviction had. *Id.*

64. Three modes only are prescribed by statute for the election, selection or appointment of a special judge. 1. If the regular judge fails to appear at the appointed time and place for holding his court, an election of a special judge for the term shall be held in accordance with the provisions of articles 1094 to 1100 of the Revised Statutes. 2. If the regular judge is, from any cause, disqualified to try a case, the parties thereto may select a special judge to try the case by agreement. 3. If the parties fail to agree, the district judge shall certify the fact to the governor, who shall appoint a special judge to try the case. In either event, it is required that the person elected, selected or appointed to serve as special

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Judge shall, before entering upon his duties, take the oath of office required by the Constitution; and the manner of his selection or appointment as special judge, together with the reason therefor, and the fact that the oath of office was administered to him, "shall be entered upon the minutes of the court as part of the record in the cause;" and the same must appear in the transcript on appeal. *Smith v. State*, 290.

65. With respect to the selection of the special judge to try this case, the entry in the transcript reads as follows: "Hon. J. M. Maxcy was selected by the State and defendant, and was sworn to try the case of *The State of Texas v. Jordan Smith*, No. 2668." *Held*, indefinite and insufficient, in that it does not show the administration to the special judge of the constitutional oath. Note the opinion for the distinction between this and *Early's* case, 9 Texas Court of Appeals, 484. *Id.*

66. The indictment in this case charges the theft of a "beef, an animal of the cattle kind." The proof shows that the alleged stolen animal was a cow. *Held*, that the term "cow" is embraced in the term "beef," and that there is no variance between the allegation and the proof. *Id.*

67. Purchase of the animal was the defense relied upon by the defendant in this case, and it was an issue raised by the evidence. It was, therefore, the duty of the trial court, however improbable the evidence supporting the issue may have appeared, to submit the issue in charge to the jury, and the failure to do so was material error. *Id.*

68. Change of venue was applied for by the accused upon an affidavit setting out the existence of such prejudice against him in the county of the forum as would deprive him of a fair trial. This affidavit was met by the State by affidavit impeaching the means of knowledge of the compurgators of the accused, and upon this issue the trial court permitted the State to call a witness and ask him "if there was sufficient prejudice against the accused in Tarrant county to prevent a fair trial." The defense objected to the question as not pertinent to the issue. *Held*, that the evidence indicated was admissible as bearing upon the means of knowledge of the compurgators, and the objection was properly overruled. *Henning v. State*, 315.

69. Continuance is properly refused if, in view of the evidence on the trial, the absent testimony as disclosed in the application is either immaterial or is probably untrue. Note the statement of the case for such testimony set forth in an application for a continuance. *Id.*

70. Bill of exceptions reserved to the overruling of a challenge to a juror for cause, is not complete, nor will it be considered by this court if it neither shows that the juror served on the jury, nor that he was challenged peremptorily by the accused, and that an objectionable juror was forced upon the accused after his peremptory challenges were exhausted. *Id.*

71. The evidence presenting only the conflicting theories of murder of the first degree on the one hand, and perfect self defense on the other, the trial judge correctly confined his charge to those two issues, and properly refrained from charging upon murder of the second degree

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and manslaughter. See the statement of the case for evidence held sufficient to support a conviction for murder of the first degree. *Henning v. State*, 815.

73. The provision of the statute (Code Crim. Proc., art. 712) which requires that in passing upon a special plea (such as a plea of former conviction) interposed as a defense to a prosecution for crime, the verdict shall specially find whether the plea is true or untrue, is mandatory, and can not be eluded upon the ground that the failure of the verdict to so find worked no prejudice to the accused. *Burks v. State*, 826.

73. The prosecution in this case was for attempting to pass a forged instrument to one H. The evidence adduced upon the plea of former conviction showed that the instrument described in the two indictments was one and the same, but that the other attempt was to pass it to another person than H., at a different time and place. *Held*, that the transactions were different, and constituted different and distinct offenses; wherefore a conviction for the one could not bar a prosecution for the other. *Id.*

74. As tending to establish the fraudulent intent of the accused in the transaction for which he was on trial, it was competent for the State to prove that, at a different time and place on the same day, the accused attempted to pass the forged instrument to a different person than the party alleged as the injured person in the indictment. But the failure of the charge to limit and circumscribe the purpose and object of such evidence was fundamental error. *Id.*

75. It is not only the province, but it is the duty of the trial judge to construe an alleged forged instrument, and to instruct the jury as to its legal effect, had it been genuine. In this case, the court properly charged that, if the alleged forged instrument were genuine, it would create a pecuniary obligation. *Id.*

76. Objections to the admission in evidence in this case of the alleged forged instrument were properly overruled, inasmuch as the letter S, before the figures \$43.00, imports nothing, is no part of the said instrument, and constitutes no part of the description of the said instrument. *Id.*

77. The trial court did not err in admitting in evidence the declarations of the defendant with regard to the transaction involved in the prosecution, made by him when not in custody nor under arrest. Nor was it error to permit the State to prove that defendant was known by another name than that he assumed in the county of the forum. *Id.*

78. To constitute an assault under the law of this State there must be the use of some unlawful violence upon the person of another, with intent to injure him or her, or some threatening gesture, showing in itself or by words accompanying it an immediate intention to commit a battery. *Carroll v. State*, 866.

79. Assault on rape is constituted by the existence of facts which bring the offense within the definition of an assault, coupled with an intention to commit rape; and such an assault can only be committed by means of force or attempted force. *Id.*

80. Leading questions are permissible, even on direct examination, if

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the witness appears to be hostile to the party producing him, or is in the interest of the other party, or unwilling to give evidence. Note the opinion for a case in which, the witness coming within each of the exceptions to the general rule, her testimony was properly admitted. *Navarro v. State*, 878.

81. Bills of exception, unless filed during the term or within ten days after the expiration of the term of the lower court, will not be considered by this court on appeal. *Stewart v. State*, 418.

82. The admission in evidence of the order changing the venue was otherwise material error, under the rules that "evidence, to be admissible, must relate to relevant facts in issue," and that "a defendant is entitled to a verdict on competent evidence, and the admission, over his objection, of incompetent evidence which might influence a jury to his prejudice, requires a conviction to be set aside, even though there be sufficient legal evidence to sustain it." Note also the suggestion of this court, that the error of admitting the order changing the venue, intensified as it was by comment of prosecuting counsel, could not be cured by an instruction to the jury to ignore the change of the venue. *Shamburger v. State*, 483.

83. See the statement of the case in *Orman v. The State*, 23 Texas Court of Appeals, 604, for the evidence of an attorney at law, held not to partake of the nature of a "privileged communication," and to have been properly admitted. *Orman v. State*, 495.

84. The proof in support of the motion for new trial, based upon the misconduct of a juror, failing to show any prejudice to the rights of the accused, the trial court did not abuse its discretion by refusing the new trial. Note the animadversion of this court upon the reprehensible conduct of a press reporter in eavesdropping the jury while considering their verdict. Note also this court's disapproval of the language used by the prosecuting counsel in the closing argument for the State. *Id.*

85. It is a settled rule of practice in this court that the refusal of a continuance will not be revised in the absence of a bill of exceptions. *Gilleland v. State*, 524.

86. Bill of exception taken to the admission of evidence should clearly disclose the nature of the objection; otherwise it is not entitled to be considered by this court. Objections not affirmatively stated in a proper bill of exceptions are to be treated as waived. *Id.*

87. Flight of an accused, after indictment and release on bail or recognizance, is a fact which may be proved for the State by showing the forfeiture of the bail bond or recognizance. *Id.*

88. The refusal of the trial court to permit counsel to read, in his argument to the jury, the opinion of this court, delivered upon the hearing of the former appeal in this case, was not error. *Guest v. State*, 580.

89. A motion in arrest of judgment is available upon any ground which would be good upon exceptions to an indictment or information for any substantial defect therein; and article 523 of the Code of Criminal Procedure enumerates the only exceptions, under our practice, to the substance of an indictment. The failure of the minutes of the court

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to show the appointment of the foreman of the grand jury, or that the grand jury was sworn, does not come within the enumerated defects. *McDantel v. State*, 552.

90. The statutes of this State provide that the trial jury shall communicate with the court through the foreman. In this case the written inquiry to the court was signed by a member of the jury other than the foreman, to which neither the judge nor the foreman of the jury objected. *Held*, that such proceeding was merely irregular, and in the absence of apparent injury to the accused was wholly immaterial. *Willis and Boyd v. State*, 586.

91. In response to an inquiry by the jury, the trial judge instructed them that the burden of proving their special plea of former conviction rested upon the defendants. *Held*, correct. *Id.*

92. The inculpatory fact relied upon in this case was the recent possession of the alleged stolen property by the defendant. The question raised by the proof was whether or not the facts established a case of recent possession. In failing to give in charge to the jury proper instructions as to the law applicable to such possession, the trial court erred. *Id.*

93. The defendant Willis requested the court to specially charge the jury as follows: "Should you believe from the evidence that defendant W. E. Willis simply stayed, or went home, if Boyd's house was his home, and was requested to assist in branding said cattle, without a previous agreement or participation in the offense charged, you will acquit him." *Held*, that, in view of the evidence tending to support this defense, the refusal of this special instruction was error. *Id.*

94. Absence of one of defendant's attorneys from the court when the case is called for trial will not entitle him to a continuance, when it appears that he is represented by other counsel and that no one of his rights is jeopardized. *Stockholm v. State*, 598.

95. At a former term of the trial court the defendant was tried and convicted of theft, but upon the affidavit of his co-defendant, who was separately tried and acquitted, he was awarded a new trial. Upon this trial, his co-defendant having departed this life, the defendant offered in evidence the affidavit of his co-defendant upon which he secured the new trial. *Held*, that the proposed evidence was properly excluded. *Id.*

96. The trial court charged the jury as follows: "When the general reputation of a witness for truth and veracity in the community in which he lives has been attacked, the inquiry must be confined to his general reputation, and not what a particular individual or a few individuals may believe concerning him; and the investigation is to be confined to his general reputation for truth and veracity, and should not extend to his general moral character; and the jury is authorized to refuse to credit and believe any witness whose reputation has been so attacked, or you may credit and believe him as you see fit and proper and believe to be proper to do so, just as though his reputation had not been so attacked; for, as before told you, you are the sole and exclusive judges of the credibility of each and all of the witnesses who have testified be-

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fore you in the case." *Held*, in view of the evidence in this case, materially erroneous. *Id.*

97. On a trial for theft the State, over the objection of the accused, was permitted to prove that, for the four or five years prior to the trial, the accused had been confined in the penitentiary for felony. *Held*, that the proof was illegal and incompetent. Its admission was error in the first place, and the trial court further erred in overruling the motion of the accused to exclude it from the consideration of the jury. *Gua-jardo v. State*, 608.

98. District Court Rule No. 57 provides, with regard to exceptions to evidence, that, if the evidence is obviously competent and admissible as tending to prove any fact put in issue by the pleadings, then the objection must assign the reason upon which it is interposed. Note a case to which the rule does not apply. *Id.*

99. Under the rule of the common law, and under the statutory law of many of the States of the Federal Union, a false statement under oath, made in the progress of a judicial proceeding, can not be assigned as perjury, unless the tribunal sitting in judgment upon the proceeding not only had jurisdiction of the matter, but when its jurisdiction had actually attached. But, under the Constitution and the statutory laws of this State, the rule is more comprehensive, and a false statement may be assigned for perjury if it was made in the course of a judicial proceeding before a court of competent jurisdiction over the subject matter of the proceeding, although its jurisdiction had not actually attached. See the opinions, both on the original hearing and on the motion for rehearing, for an elaborate discussion of the principles underlying the rule. *Anderson v. State*, 705.

100. The perjury assigned in this case, was the alleged false testimony given by the accused upon the trial, in a justice's court, of one Green Wright, upon a charge of carrying a pistol. The prosecution against Wright was based upon a complaint and information, the former of which is required by law to be verified by the oath of some credible person. Evidence was introduced upon this trial which tended strongly to show that the complaint under which the prosecution of Wright was had was not sworn to; and upon the theory that, if the complaint was not sworn to, the jurisdiction of the justice of the peace had not attached in the Wright case, a false statement by accused in that proceeding was not assignable as perjury, the accused asked the trial court to charge the jury that, if they had a reasonable doubt that the complaint was sworn to, they should acquit. *Held* that, under the rule first announced, the trial court did not err in refusing the special charge. *Id.*

101. A conviction for perjury, to be legally obtained, must be had upon the testimony of at least two credible witnesses, or that of one credible witness strongly corroborated by other evidence. See the statement of the case for evidence which, though conflicting, is *held* sufficient to support the conviction for perjury. *Id.*

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PRACTICE IN THE COURT OF APPEALS.

See HABEAS CORPUS, 1.

1. The penalty assessed by the verdict in this case was a fine of twenty dollars, but the same, by inadvertence, is recited in the judgment as twenty-five dollars. This court reforms the judgment to conform to the verdict of the jury. *Robinson v. State, 4.*

2. The rule obtains in this State that "whenever there is reason to apprehend that injury may have resulted to the defendant, especially in a case of felony, from a failure to observe directions given the court by the Legislature, the judgment of conviction will be reversed." *Holsey v. State, 35.*

8. In the absence of a statement of facts and bills of exception, this court is called upon to review the record on appeal only with reference to the sufficiency of the indictment and the correctness of the charge of the court. *Banks v. State, 559.*

PREDICATE.

See the statement of the case for evidence held sufficient as a predicate for the admission of the written testimony of an absent witness. *Parker v. State, 61.*

PRESUMPTIONS.

See CHARGE OF THE COURT, 43.
THEFT, 49.

PRINCIPAL OFFENDERS.

See EVIDENCE, 82.

In order to constitute the accused a principal in the crime of theft, it devolves upon the State to establish his complicity in the original taking. In view of the evidence in this case, and of the refusal of a charge based upon it, the failure of the trial court to apply this doctrine to the case, in so far as it concerned the defendant Lindly, was error. *Collins and Lindly v. State, 141.*

PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 62.

PRIVILEGE OF COUNSEL.

See PRACTICE, 18.

1. Violent language used in argument by the prosecuting counsel, if the same was called forth and demanded by remarks of counsel for the defense, can not be held to constitute such an abuse of the privilege of argument as will vitiate a conviction. *Williams v. State, 82.*

2. Note the opinion for the substance of an argument by prosecuting counsel, held to be an abuse of the privilege of counsel. *Tillery v. State, 251.*

8. The proof in support of a motion for new trial, based upon the misconduct of a juror, failing to show any prejudice to the rights of the

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PRIVILEGE OF COUNSEL—continued.

accused, the trial court did not abuse its discretion by refusing the new trial. Note the animadversion of this court upon the reprehensible conduct of a press reporter in eavesdropping the jury while considering their verdict. Note also this court's disapproval of the language used by the prosecuting counsel in the closing argument for the State. *Orman v. State*, 495.

PURCHASE.

See **THEFT**, 23.

R.**RAPE.**

See **ASSAULT TO RAPE**.

ATTEMPT TO RAPE.

1. The first count in the indictment in this case charged a rape upon a female over the age of ten years, and the second count charged a rape upon a female under the age of ten years. Under preponderating proof of consent and non-penetration, but conflicting proof as to the age of the female, the trial court charged the jury as follows: "But if you believe from the evidence that there was not such penetration; but that defendant made an assault upon Hattie Gray, not with intent to commit rape upon her, but with intent to have sexual intercourse with her, with her consent, then you will find the defendant guilty of an aggravated assault," etc. *Held*, abstractly correct, but, in view of the evidence, erroneous in that it did not direct an acquittal if the jury believed from the evidence that the female consented to the sexual act, and was over the age of ten years. *Taylor v. State*, 299.

2. Upon the issues of rape and consent the trial court charged the jury as follows: "If you believe from the evidence that the defendant did, as charged, have carnal knowledge of the said Hattie Gray, but have a reasonable doubt whether such carnal knowledge was obtained with her consent, the defendant should be acquitted unless you believe beyond a reasonable doubt that Hattie Gray was under ten years of age; in which event consent makes no difference." *Held*, that the charge, in view of the evidence which clearly disproved carnal knowledge, was erroneous because it rested the defendant's right to acquittal upon a hypothesis eliminated by the proof. *Id.*

3. The charge is otherwise erroneous in that, under the proof, it failed to instruct the jury in substance, that defendant should be acquitted of assault to rape or aggravated assault if the female was not under the age of ten years and consented to the act of the defendant. *Id.*

RECEIVING STOLEN PROPERTY.

Receiving stolen property knowing it to be stolen is, under the law of this State, a separate and distinct offense from theft, and a party indicted for theft can not, under that indictment, be convicted of receiving stolen property, knowing it to be stolen. *Gray v. State*, 611.

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REPEALED LAWS.

It is a settled rule in this State that "the repeal of the local option law by the prescribed mode, pending an appeal from a conviction for its violation while in force, annuls the conviction." This conviction, under this rule is a nullity. *Wells v. State*, 230

RULES OF THE DISTRICT COURT.

District Court Rule No. 57 provides, with regard to exceptions to evidence, that, if the evidence is obviously competent and admissible as tending to prove any fact put in issue by the pleadings, then the objection must assign the reason upon which it is interposed. Note a case to which the rule does not apply. *Guajardo v. State*, 608.

S.**"SALOONS."**

See LIQUOR TRAFFIC.

SCIRE FACIAS.

1. The object of the scire facias in a criminal case is to bring the sureties into court to show cause why judgment should not be entered against them upon the bond already forfeited, and it is not essential that the writ shall embrace the principal in the bond. *Hutchings v. State*, 242.

2. The rules which regulate and control the amendment of a citation and petition in a civil case apply to a scire facias case. Moreover, it is essential that the scire facias, in cases like the present, should show on its face, either by original or amended averment, that there is, in fact, no actual, though there may be an apparent, variance in the names of the parties to the bond. The trial court did not err in permitting the scire facias to be amended to show that the John McCulloch described therein was the W. J. McCulloch who signed as the principal in the forfeited bond. *Id.*

3. It is not a sufficient objection to the proceedings in a scire facias case that the trial court permitted such an amendment of the scire facias without notice to the principal in the bond. Note the opinion for the distinction between this and Collins's case, 16 Texas Court of Appeals, 274. *Id.*

4. It is a well settled general rule that final judgments upon forfeited bail bonds can not be rendered at the criminal terms of the county courts. But see the opinion in extenso for a summary of the legislation which is held to operate as an exception to the rule in favor of the criminal county court of Titus county, and to specially confer on it jurisdiction to render final judgments upon forfeited bail bonds. *Id.*

SELF DEFENSE.

See CHARGE OF THE COURT, 29, 52, 73.

1. See the opinion and the statement of the case for evidence on a murder trial, which, while it did not demand a charge upon the law of self defense, was of such character as to demand a charge upon the law of manslaughter. *Arrellano v. State*, 43.

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SELF DEFENSE—continued.

2. See the statement of the case for evidence *held* not to raise the issue of self defense, and to be sufficient to support a conviction for murder in the second degree. *Melton v. State*, 47.

3. It is a well settled principle of law that if one willingly enters into a deadly conflict, or provokes the contest, or produces the occasion, in order to have a pretext for killing his adversary or doing him great bodily harm, the killing will be murder, no matter to what extremity he may have been reduced in the conflict. Note the opinion for a state of proof in a murder case to which the rule applies, eliminating the issue of self defense. *Allen v. State*, 216.

4. The evidence on a murder trial disclosed that for a period long anterior to the homicide the deceased was at enmity with the accused; that he had repeatedly, without apparent, probable or reasonable cause, charged the accused with a felony; that he had threatened to kill the accused; that he had conspired with one T. to kill the accused, and that, at the time of the homicide, he was acting together with T. in pursuance and furtherance of said conspiracy; that he and T. made an unsuccessful attempt on the night before the homicide to induce other parties to co-operate with them in the murder of the accused on that night, of which effort on the part of the deceased and T. the accused, on the same night, was informed; that on the next morning, immediately after a conference with T., the deceased, armed with a pistol, accosted the accused and again charged him with the felony; that the accused thereupon demanded that the charge be retracted by the deceased, when the deceased placed his right hand to his right side (where his pistol was afterward found), and the accused fired the fatal shot. *Held*, that the evidence fairly raised the issue of self defense, and authorized the court to charge the jury upon that issue; but that, as there was no evidence tending to show that the accused had forfeited his right of self defense by seeking and provoking the difficulty, the charge upon that issue was not authorized by the proof, was prejudicial to the accused, and was, therefore, erroneous. *Tillery v. State*, 251.

5. The rule prescribing the extent to which a person in emergency is authorized to act upon appearances of danger is as follows: If, from the standpoint of the slayer, it reasonably appeared to him, from the circumstances of the case, that the danger existed, and he acted under the reasonable belief that it did exist, he was justified in defending against it to the same extent, and under the same rules, as if the danger had been real. The charge in this case was erroneous, in that it limited such right of the accused to his *honest belief* that he was in danger, and erroneously made this idea prominent by reiteration. *Id.*

6. The charge of the court is otherwise erroneous in that the instruction relating to the threats uttered by the deceased against the accused is disconnected from that portion of the charge which relates to self defense, whereas it should have formed a part of the instruction on the law of self defense, and should have been given in immediate connection with that issue. *Id.*

7. See the opinion and the statement of the case for evidence on a

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SELF DEFENSE—continued.

murder trial *held* not to raise the issue either of manslaughter or of self defense; wherefore the trial court properly refused to instruct the jury upon those questions. *Brooks v. State*, 274; *Thumm v. State*, 667.

8. The doctrine of self defense, which applies to a defensive and not an offensive act, and which is limited to necessity, and can not exceed the bounds of mere defense and prevention, will not avail a slayer who, by his own wrongful act, brought about the affray or produced the necessity for taking the life of the person slain, in order to protect his own life. In other words, if a person voluntarily engages in a combat, knowing that it will or may result in death, or some serious bodily injury that may produce the death of his adversary or himself, he can not claim that he acted in self defense. Note a state of case to which the rule applies. Note also that the evidence does not present the doctrine of imperfect self defense. *Thumm v. State*, 667.

SPECIAL JUDGE.

1. Three modes only are prescribed by statute for the election, selection or appointment of a special judge. 1. If the regular judge fails to appear at the appointed time and place for holding his court, an election of a special judge for the term shall be held in accordance with the provisions of articles 1094 to 1100 of the Revised Statutes. 2. If the regular judge is, from any cause, disqualified to try a case, the parties thereto may select a special judge to try the case by agreement. 3. If the parties fail to agree, the district judge shall certify the fact to the Governor, who shall appoint a special judge to try the case. In either event, it is required that the person elected, selected or appointed to serve as special judge shall, before entering upon his duties, take the oath of office required by the Constitution; and the manner of his selection or appointment as special judge, together with the reason therefor and the fact that the oath of office was administered to him, "shall be entered upon the minutes of the court as part of the record in the cause;" and the same must appear in the transcript on appeal. *Smith v. State*, 290.

2. With respect to the selection of the special judge to try this case, the entry in the transcript reads as follows: "Hon. J. M. Maxey was selected by the State and defendant, and was sworn to try the case of *The State of Texas v. Jordan Smith*, No. 2668." *Held*, indefinite and insufficient, in that it does not show the administration to the special judge of the constitutional oath. Note the opinion for the distinction between this and *Early's case*, 9 Texas Court of Appeals, 484. *Id.*

SPECIAL PLEA.

See FORMER ACQUITTAL AND CONVICTION, 7.

STATEMENT OF FACTS.

See PRACTICE IN COURT OF APPEALS, 3.

STATUTES CONSTRUED.

See INTERPRETATION OF THE CODES.

MURDER, 26.

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SURETIES.

See **SCIRE FACIAS**, 1, 4.

SURPRISE.

See **PRACTICE**, 17.
WITNESS, 2.

SWINDLING.

1. An indictment for swindling by false pretense should positively and clearly aver the commission of the acts by the accused. If a written instrument enters into the offense as matter of inducement, the said instrument should be set out, as in forgery. See the statement of the case for an indictment *held* insufficient to charge the offense of swindling by false pretense; wherefore the motion in arrest of judgment should have prevailed. *Dwyer v. State*, 182.

2. Indictment charged the offense of swindling by means of a promissory note, which, though he knew it to be neither valid nor genuine, the accused represented to be good, valid and genuine. The indictment sets out the note in *hæc verba*, and upon its face it appears to be a valid obligation. The indictment, however, fails to allege the facts which render the note invalid and worthless. Exception to the indictment and a motion in arrest of judgment based upon this omission were overruled. *Held*, that the exception and the motion in arrest were well taken, and should have prevailed. *Wills v. State*, 400.

3. See the statement of the case for evidence *held* to have been improperly admitted in a trial for swindling, inasmuch as it was both hearsay and immaterial to any issue in the case. But, had the same been admissible as bearing upon the question of intent, the charge of the court would be deficient in failing to limit it to that issue. *Moody v. State*, 458.

4. See the statement of the case for the evidence of the witness Hulen, *held*, though remote, to have been properly admitted as bearing upon the issue of intent. *Id.*

T.**THEFT.**

See **CHARGE OF THE COURT**, 15, 72.

1. Possession of stolen property by the accused, however recent that possession may be, if explained and accounted for, and shown by the evidence to be lawful, will afford against the accused no legal presumption of guilt of theft. See the opinion for the substance of evidence *held* insufficient to support a conviction for the theft of a mare. *Bean v. State*, 11.

2. The conviction in this case was for burglary. It was had under an indictment which charged conjointly the offenses of burglary and theft. The allegations were that defendant did burglariously enter the house with the intent to commit theft, and that he did commit theft of certain personal property. The indictment proceeded to allege, not the elements of the theft which it charged he *intended* to commit, but the elements of the theft which he *did* commit. The contention of the

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appellant is that the indictment is insufficient to support the conviction for burglary, because it failed to allege the elements of the *intended* theft. *Held*, that, alleging the elements of the theft *actually* committed, the indictment is sufficient to support the conviction for burglary. *Williams v. State*, 69.

3. If the purpose of the pleader had been merely to charge a burglary with intent to commit an offense, and not to charge burglary and the actual commission of the offense, then the indictment would be insufficient unless it alleged the elements of the intended offense. *Id.*

4. The rule is, that if burglary and theft be charged in the same count, and the party charged be convicted, the theft will be included in the burglary, and no judgment can be rendered for the theft. In such case, however, the conviction for burglary will bar a subsequent prosecution for the theft. *Id.*

5. "Actual care, control and management" of the alleged stolen property is, under our statute defining theft, such possession as will support an allegation of possession. *Tinney v. State*, 112.

6. The indictment in this case alleged both the ownership and possession in D. The proof showed that, though the animal belonged to D., one H. found it on his premises, took it up, and staked and fed it on his premises, and proclaimed his intention to stray it. But, before H. could complete the estray of the said animal, it was stolen from the stake on his premises. *Held*, that the proof shows that H. had the "care, control and management" of the horse, which constituted possession; and therefore the variance between the allegation and proof of possession is fatal to the conviction. *Id.*

7. The indictment alleges both the ownership and possession of the alleged stolen animal to have been in one W. The evidence shows conclusively that, when taken, the animal was under the care, management and control of one F., who held it for W. *Held*, that the variance between the allegation and proof of possession is fatal to the conviction. *Alexander v. State*, 126.

8. While the statute makes a recorded brand admissible as evidence of ownership, the statute does not make it prima facie proof of ownership, and it can be considered only as any other evidence before the jury could be considered. To have given a requested charge upon the effect of such evidence would, therefore, have been to give a charge upon the weight of evidence, which the trial court properly refused to do. *Id.*

9. Evidence *held* insufficient to support a conviction for theft. *Romero v. State*, 130.

10. See the statement of the case for evidence *held* to support the conviction for theft of the defendant Collins, but insufficient to support the conviction of Lindly, his co-defendant. *Collins and Lindly v. State*, 141.

11. Information or indictment for theft of the property of a corporation must not only describe the corporation by its correct corporate name, but should allege that it was a corporation. Allegation that the

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"Mo. P. Rway Company" was the owner of the stolen property will not suffice. See the opinion in extenso for a discussion of the question, and for the substance of an information held insufficient to charge the offense of theft. *White v. State*, 281.

12. Felonious intent is the essential ingredient of theft, and, to constitute that offense, the taking must, in the first instance, have been fraudulent, and if the possession be obtained lawfully, no subsequent appropriation, however fraudulent the intent, will suffice to constitute the taking theft, unless such lawful possession was obtained by means of false pretext, or with the fraudulent intent, at the very time of the taking, to deprive the owner of the value of the property and appropriate the same to the use and benefit of the taker. See the opinion for a requested charge, which, harmonizing with this doctrine, was, in view of the facts in proof, erroneously refused. *Guest v. State*, 235.

13. Note a case in which the trial court should have given in charge to the jury the established doctrine, that, "in cases where there is evidence from which the jury might infer that the taking was not fraudulent, it is the right of the defendant to have them clearly instructed as to the distinction between trespass and theft." *Id.*

14. The indictment charged the possession and ownership of the alleged stolen horse to be in one J. C. B. The proof showed that the animal was taken by the accused from a place at which one Bull had hopped it by direction of D. H. B., who had borrowed the horse from J. C. B. *Held*, that the proof established the possession in D. H. B., and that the variance between the allegation and proof on the issue of possession is fatal to the conviction. *Conner v. State*, 245.

15. The proof showed that, for the purpose of detecting the accused in the very act of theft, the horse was hopped with the expectation and the intent that defendant would take him. It was contended by the defense that the proof established a taking with the consent of the owner. *Held*, that the position is without merit, as the owner in no way suggested the theft to the accused nor induced him to commit it. *Id.*

16. Neither asportation nor actual manual possession of the property is essential to constitute theft. *Id.*

17. The indictment in this case charges the theft of a "beef, an animal of the cattle kind." The proof shows that the alleged stolen animal was a cow. *Held*, that the term "cow" is embraced in the term "beef," and that there is no variance between the allegation and the proof. *Smith v. State*, 290.

18. Purchase of the animal was the defense relied upon by the defendant in this case, and it was an issue raised by the evidence. It was, therefore, the duty of the trial court, however improbable the evidence supporting the issue may have appeared, to submit the issue in charge to the jury, and the failure to do so was material error. *Id.*

19. While a recorded brand is evidence of ownership, it and the brand found upon the animal must correspond and be identical, and it must appear on the part of the animal indicated in the record, or the discrepancy in this regard must be satisfactorily explained by the evi-

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dence. See the opinion for evidence *held* to show that the brand found upon the animal was different from the brand set out in the record, and, therefore, being the only evidence on the issue of ownership, and not sufficient upon that issue, is insufficient to support the conviction. *Myers v. State*, 334.

20. See the opinion and the statement of the case for evidence *held* to have been improperly excluded, because, under the facts in this case, it tended to support an issue of identity of the animal. *Id.*

21. The evidence in this case tending to support the defense that the accused killed the alleged stolen animal by direction of his employer, the charge of the court was erroneous in not instructing the jury that if they believed that the accused took the said animal by direction of his employer, for the use and benefit of his employer, believing at the time that his said employer owned or had a right to appropriate the animal, then the accused would not be guilty of theft, because of the absence of the fraudulent intent. *Id.*

22. See the statement of the case for evidence *held* insufficient to support a conviction for theft, because insufficient to support the allegation of ownership of the alleged stolen animal. *Id.*

23. Purchase of the animal was the defense interposed to the prosecution for the theft of the same, and, the defendant having produced evidence tending to establish that defense, he was entitled to an affirmative charge instructing the jury to the effect that if they believed from the evidence that the defendant purchased the animal, or if, from the evidence as to the purchase, they entertained a reasonable doubt that he stole the animal, they must acquit him of the charge of theft. The refusal of a special charge embodying the rule as stated was error. *Roy v. State*, 369.

24. The prosecuting witness having testified on his direct examination that he found his stolen sheep in the possession of one D., and that D. at first agreed to surrender the animals, but subsequently refused to do so, was asked on his cross examination if D., when he refused to surrender the sheep, did not assign as his reason for so doing that he had purchased them. This question and the answer thereto were excluded as hearsay. *Held*: That the ruling was error, the question and the answer being legitimate under the rule that when "part of a conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other." *Stockman v. State*, 387.

25. The questions and answer should also have been admitted under the rule that "when an act is done to which it is necessary or important to ascribe a character, motive or object, what was said by the actor at the time, from which the character, motive or cause may be collected, is part of the *res gestæ*—verbal acts—and may be given in evidence, whether the actor be or be not a party to the suit." *Id.*

26. With respect to the presumption arising from the possession of recently stolen property, the trial court charged the jury as follows: "If a person is found in possession of property recently stolen, and if the circumstances are such as call upon him for an explanation, and he fails to

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give any explanation of such possession, then these facts would authorize his conviction, if a presumption of guilt has arisen in the minds of the jury from such facts." *Held* erroneous, as being a charge upon the weight of evidence. See the opinion *in extenso* for the correct rule upon the subject. *Id.*

27. Possession of stolen property, whether recent or remote, is a circumstance admissible in evidence, to be considered by the jury in connection with the other proof in the case. But to warrant the inference of guilt from the possession alone, the possession must be a personal one; must be recent and unexplained, and must involve a distinct and conscious assertion of claim by the possessor. Note the opinion for a state of proof to which this rule applies; wherefore, in refusing a special charge in harmony with the principle, the trial court erred. *Moreno v. State*, 401.

28. But note that, in this case, even had the charge been given, the evidence would not support a conviction, because recent possession alone, without an opportunity to explain, will not authorize a verdict of guilty. Had the special charge been given, the evidence would still have demanded the award of a new trial. *Id.*

29. See the opinion *in extenso* for a summary of the inculpatory proof in this case *held* insufficient to support a conviction for theft of cattle. *Id.*

30. The *factum probandum* of theft, as that offense is defined by our statute, is the *taking* of the property. If the *taking*, being the main fact in issue, is not directly attested by an eye witness, but is proved as a matter of *inference* from other facts in evidence, the case rests wholly upon circumstantial evidence, and the failure of the trial court to give in charge to the jury the law of circumstantial evidence is material error. *Crowell v. State*, 404.

31. The *corpus delicti* of theft can not be established by the uncorroborated testimony of an accomplice, but upon that issue the accomplice must be corroborated by other evidence tending to show the commission of the offense, and the defendant's connection with the commission of the same. It will not suffice to corroborate such testimony only to the extent of connecting the defendant with the commission of an act alleged to be an offense. In this case the ownership of an animal alleged in the indictment was proved only by the uncorroborated testimony of the accomplice. *Held*, insufficient on the issue of ownership, and, therefore, insufficient to support the conviction. *Id.*

32. See the statement of the case for a charge of the court upon accomplice testimony *held* erroneous, because it applies the law too broadly to the facts of the case, and does not, as it should, require the corroboration of the accomplice to be as to facts tending to show the commission of an offense, and the defendant's connection with such commission. *Id.*

33. The charge in this case is otherwise erroneous in that it instructs the jury that the *killing* of the animal constituted the offense, whereas, the *taking* (if any) of the animal constituted the offense. Moreover, the facts demanded that the charge should submit to the jury whether the

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witness M. was an accomplice, and in omitting to do so, and in refusing the defendant's requested instruction upon the subject, the trial court erred. *Id.*

84. A brand, although recorded after the commission of the offense, is admissible in evidence, but is not sufficient to prove ownership. *Id.*

85. A "road brand," as distinguished from a "range brand," is a brand required by statute to be placed upon cattle before being removed from the county in which they are gathered to market outside of the State, which brand must be recorded in the county from which the cattle are to be driven, and before their removal from such county. The brand introduced in evidence in this case was the "road brand" of the alleged owner which was recorded *after* the cattle were driven from the county where gathered, and after the commission of the offense. *Held*, that the said brand was inadmissible to prove ownership, and should have been excluded. *Id.*

86. As tending to establish identity in developing the *res gestæ*, or to prove guilt by circumstances connected with the theft, or to show the intent of the accused with respect to the property described in the indictment, it is competent for the State to prove the theft by defendant of other property at the same time and place of the theft in question, but it is not competent to prove a distinct theft committed by defendant at another time and place. See the statement of the case for evidence of distinct thefts *held* to have been erroneously admitted. *Williams v. State*, 412.

87. See the statement of the case for evidence *held* insufficient to identify the animal traced to the possession of the accused as the alleged stolen animal described in the indictment, and, therefore, insufficient to support the conviction for theft. *Stewart v. State*, 418.

88. See the statement of the case for evidence upon a trial for theft *held* to be inadmissible, because hearsay. *Gentry v. State*, 478.

89. Charge of the court instructed the jury to "find the defendant guilty if he and Homer Smith were acting together fraudulently, and the horses were taken by either of them." *Held*, erroneous. The charge should have been to the effect that, to constitute the defendant a principal in the theft, he must have taken the horses himself, or must have acted together with Homer Smith in committing the theft, knowing at the time the fraudulent intent of said Smith, and, if not present with Smith at the time of the commission of the theft by said Smith, must have been acting with him at the very time of the commission of said theft in pursuance of a common design existing between them to commit the theft. *Id.*

40. It devolves upon the State, in a prosecution for theft, to prove the name of the owner of the alleged stolen property as it is alleged in the indictment. The given name may be alleged by initials; and, though a variance between the middle initial as alleged and as proved will be immaterial, a variance as to the first initial letter of the given name will be fatal, unless it be proved that the owner was known as well by the name alleged as by the name proved. The indictment alleged the name

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of the owner in this case to be N. J. S., and the proof showed the name to be M. J. S. The trial court charged, in substance, that if the jury believed M. J. S. to be the person named in the indictment as N. J. S. the proof of ownership would be sufficient. *Held*, erroneous. *Willis v. State*, 487.

41. To constitute theft the taking of the property must have been wrongful, unless the possession of the property was obtained by some false pretext, or the taking was accompanied by the intent to deprive the owner of the value of the property. Conversion by the accused of property lawfully obtained is not sufficient to establish the fraudulent intent at the time of the taking. See the opinion in extenso for the substance of evidence *held* insufficient to support a conviction for horse theft. *Stokeley v. State*, 509.

42. It is a general rule of evidence that the acts or declarations of a conspirator will not be admitted in evidence against his co-conspirator unless they were done or made pending the conspiracy, and were in furtherance of the common design. See the opinion in extenso on the question, and for a case in which the declarations of a co-conspirator were, under the rule announced, improperly admitted against the accused. *Cortez v. State*, 511.

43. Though under an indictment charging theft of cattle in the usual form, a conviction may be had either for the theft defined in article 749 of the Penal Code or for the misdemeanor of driving cattle from their accustomed range as defined in article 767 of the Penal Code, the verdict, to be sufficient, must show with reasonable certainty of which offense, the the felony or misdemeanor, the accused was found guilty. *Guest v. State*, 530.

43. When the indictment charges an offense which includes other offenses, and all the offenses covered by the indictment are submitted to the jury by the charge of the court, a general verdict of guilty, assessing a penalty applicable to either of the offenses, is uncertain, and will not support a judgment. The rule is that "when a verdict is so defective and uncertain that the court can not know for what offense to pass judgment, it should be set aside." The indictment in this case charged the accused with the felony of cattle theft, and also with the misdemeanor of driving cattle from their accustomed range. The verdict found the defendant "guilty as charged in the indictment," and assessed the penalty applicable as well to the misdemeanor as to the theft defined in the said article 749 of the Penal Code, and the court adjudged the conviction to be for the felony. *Held*, that the verdict was illegal in failing to designate the offense of which the jury found the accused guilty, and does not authorize the judgment. The verdict should not have been received, but, having been received, the trial court should have awarded a new trial. *Id.*

44. When, as in this case, the evidence on a trial for theft tends to show a voluntary return of the stolen property by the accused to the owner, within a reasonable time, and before prosecution has been instituted, it devolves upon the trial court to charge the jury upon the law

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applicable to such defense. See the statement of the case in *Guest v. The State*, ante, page 235, for evidence *held* to raise the issue of a voluntary return of the alleged stolen property, within the statutory meaning of that defense. *Id.*

45. See the statement of the case in *Guest v. The State*, ante, page 235, for a state of proof under which the trial court should have instructed the jury with reference to the law applicable to a defendant's explanation of his possession of stolen property, made when his possession was first challenged. In refusing the special charge upon the subject requested by the accused, the trial court erred. *Id.*

46. See the statement of the case in *Guest v. The State*, ante, page 235, for evidence *held* insufficient to support a conviction for cattle theft, inasmuch as it does not establish the fraudulent intent. *Id.*

47. However improbable may be the evidence in support of a defense, it is the duty of the trial court to submit the issue to the jury under proper instructions. A defense witness in this case testified that he was present and witnessed the defendant's purchase of the alleged stolen animal. *Held*, that in failing to submit the question of a purchase *vel non* to the jury, the charge of the court was erroneous. *McDaniel v. State*, 552.

48. Possession of recently stolen property is not positive evidence of theft. At most, it is but a circumstance tending to establish theft. A case, therefore, depending alone upon the possession of recently stolen property is a case resting alone upon circumstantial evidence, and in such case the omission of the trial court to charge the jury upon the law of circumstantial evidence is material error. Note the opinion for a state of proof to which the rule applies. *Boyd v. State*, 570.

49. The general rule obtains that if a party, in whose exclusive possession property recently stolen is found, fails reasonably to account for his possession when called upon to explain, or when the facts are such as to require of him an explanation, the presumption of guilt arising from recent loss and possession will warrant a conviction without further proof. In such case, however, it is for the jury, under proper instructions, to determine the question of recent possession; and they should be explicitly charged that, unless they found such possession was recent, they would indulge no presumption of defendant's guilt because of his being found in possession of the property. The failure of the trial court, under the proof in this case, to charge the jury upon this doctrine, and its refusal to give the special instruction upon the same, was material error. *Id.*

50. In order to warrant a conviction for theft, it devolves upon the State to show by affirmative proof the defendant's participation in or connection with the original taking of the property. If the proof merely connects the defendant with the property subsequent to its actual taking, it will not authorize a conviction for theft, however manifest it may make his guilt of another offense. See the opinion for a statement of the rule on the doctrine. *Id.*

51. Upon the proof in this case, which failed to show the defendant's

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connection with the original taking of the stolen property, but tended to establish his subsequent connection with the same, with the knowledge that it was stolen, the defense requested the trial court to charge the jury as follows: "Before the jury can convict the defendant, they must believe beyond a reasonable doubt that he is guilty of the original fraudulent taking, and any subsequent connection after the taking would not be theft, either in good or bad faith; and, if the jury believe the defendant purchased the cow from Mixon, or any other party, after the fraudulent taking, either in good or bad faith, he is not guilty of theft." *Held*, that under the rule announced, and under the proof stated, the refusal of the requested charge was error. *Id.*

52. Accomplice testimony, to be sufficient, must be corroborated by other evidence, showing not merely the commission of the offense charged, but that the defendant committed or participated in its commission. Moreover, to be sufficient, such corroboration must include the material or main issue on the trial; the main issue in this case being the original taking of the stolen property. See the statement of the case for a charge of the court upon the subject, *held* insufficient. *Id.*

53. Upon a trial for theft—possession of the stolen property being the inculpatory fact—the State was correctly permitted to prove the defendant's contemporaneous possession of other stolen animals than that described in the indictment; such proof being admissible upon the question of identity in developing the *res gestæ*, or to prove by the circumstances the theft on trial, or the intent of the accused with respect to the animal named in the indictment. But, in failing to limit such proof to such purpose, the charge was materially defective. *Willis v. State*, 584.

54. An essential element of the crime of theft is that the property was taken by the accused with intent to appropriate the same to his own use and benefit. In the general charge in this case, this element, in the application of the law to the facts, was omitted. *Held*: That, in view of the proof on the trial, the omission was error. *Id.*

55. The defense requested a special charge, as follows: "If Boyd bought the cow from Mixon, whether in good or bad faith, and defendant's connection with the cow was only to aid in disposing of said cow—in other words, if said cow was stolen by some one else than defendant, and sold to Boyd—then defendant's subsequent connection with the cow would not be theft, and, if you so find, you will acquit the defendant." *Held*: That, in view of the evidence on the trial, the refusal of the special charge was error. *Id.*

56. It is well settled in this State that the stealing of different articles of property, belonging to different owners, at the same time and place, so that the transaction is the same, is but one offense, and the accused can not be convicted on separate indictments charging different parts of one transaction as in each a distinct offense. A conviction on one of the indictments bars a prosecution on the other. *Willis and Boyd v. State*, 586.

57. The proof on the trial showed that the defendants had been sepa-

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rately convicted for the theft of a cow, the property of one W. The animal involved in this prosecution was alleged to be the property of one C., and was found in the possession of the defendants at the same time and place and under the same circumstances as the W. cow. It showed, also, that when last seen, before being found in the defendants' possession the W. cow was on her range a mile and a half west of the town of A., and that the C. cow, when last seen before she was found in the possession of the defendants, was on her range several miles southwest from the said town of A. Under this proof, the defendants pleaded in bar to this prosecution their former conviction for the theft of W.'s cow, alleging the taking of the two cows to be but one transaction. The jury found against the truth of the special plea. *Held*, that the finding of the jury was supported by the proof, and was correct. *Id.*

58. Inasmuch as asportation is not necessary in this State to constitute theft, and inasmuch as the marking and branding of an animal can not be accomplished without an actual manual possession of the same by the person so doing, an illegal marking and branding of an animal for the purpose of appropriating the same will evidence a fraudulent taking. But note the opinion for a state of proof which would more properly support an indictment for defacing or altering brands, as that offense is defined by article 760 of the Penal Code. *Coward v. State*, 590.

59. The indictment charged the appellant with the theft of "one head of neat cattle." The proof shows that the cow of the alleged owner, with her original ear marks changed into the ear marks of the appellant, was found in the pen of the appellant, the appellant and another being present. To the owner's claim of property, the appellant asserted no counter claim, nor did he offer any explanation of his possession, but helped to turn the cow out of the pen. Afterwards, a yearling, the offspring of the cow, was found upon the range, both the brand and the ear marks of the owner of the cow, originally upon it, having been changed to the brand and ear marks of the appellant. *Held*, that the proof should have been made to designate which of the animals was referred to in the indictment, and the charge of the court should have limited the evidence respecting the other animal to the legitimate purpose for which it was received. For the same reason,—that it does not identify the animal referred to in the indictment,—the evidence is insufficient to support the judgment of conviction. *Id.*

60. The charge of the court was otherwise erroneous inasmuch as, although the proof established an unexplained possession of property recently stolen, it failed to instruct the jury upon the law applicable to that phase of the case. *Id.*

61. See the statement of the case for evidence on a trial for horse theft, which, being wholly circumstantial, is *held* to have demanded from the trial court a charge upon the law applicable to circumstantial evidence. *Fuller v. State*, 596.

62. See the statement of the case for evidence on a trial for horse theft which, being wholly circumstantial, is *held* to have demanded of

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the trial court a charge upon circumstantial evidence. *Guajardo v. State*, 608.

63. Evidence sufficient to support a conviction for theft. *Blain v. State*, 626.

64. The indictment alleged the ownership of the property stolen to be in Columbus C. Littlefield, and the proof disclosed that, though his proper name was Christopher Columbus Littlefield, he was usually known as Columbus Littlefield, and was often addressed as Columbus C. Littlefield. *Held*: That, if the proof showed that he was as well known by the name set out in the indictment as by any other, a conviction otherwise regular would be sustained. *Lott v. State*, 728.

65. If the possession of the property was obtained by the defendant from the owner, lawfully and in good faith, its subsequent appropriation by the defendant to his own use, without the owner's consent, does not constitute theft. *Id.*

67. A conviction for embezzlement can not be obtained on an indictment for theft. *Id.*

THREATS.

See CHARGE OF THE COURT, 29.

MURDER, 19, 26.

Proof of deadly threats made by the deceased against the accused, and that the deceased was a violent and dangerous character, and that the threats and the character of the deceased were known to the accused at the time of the homicide, can afford no justification for homicide without proof that, at the time of the homicide, the deceased did some act indicating a present intention to kill the accused or do him serious bodily harm. Neither the evidence adduced on the trial nor that foreshadowed in the application for continuance laid a predicate for proof of threats in this case; wherefore a continuance was properly refused. *Brooks v. State*, 274.

TITUS COUNTY.

See JURISDICTION, 2.

TRANSFER.

See INDICTMENT, 3.

U.**UTTERING A FORGED INSTRUMENT.**

See FORGERY, 1.

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V.

VARIANCE.

See EVIDENCE, 83.

INDICTMENT, 10.

THEFT, 6, 14.

The indictment alleges both the ownership and possession of the alleged stolen animal to have been in one W. The evidence shows conclusively that, when taken, the animal was under the care, management and control of one F., who held it for W. *Held*, that the variance between the allegation and proof of possession is fatal to the conviction. *Alexander v. State*, 126.

VENUE.

See CHANGE OF VENUE, .

VERDICT.

1. Article 722 of the Code of Criminal Procedure, which provide that "when the defendant is acquitted on the ground of insanity, the jury shall so state in their verdict," is merely directory; and though its substance should be charged by the trial court in all cases involving the issue of insanity, still the omission to so charge, if without apparent injury to the accused, is not material error. *Massengale v. State*, 181.

2. Verdict in the case reads as follows: "We, the jury, find the defendant guilty, as charged in the indictment, of murder in the first degree, and assess his punishment at life time in the penitentiary." *Held*: sufficient. *Carroll v. State*, 813.

3. The provision of the statute (Code Crim. Proc., art. 712) which requires that in passing upon a special plea (such as a plea of former conviction) interposed as a defense to a prosecution for crime, the verdict shall specially find whether the plea is true or untrue, is mandatory, and can not be eluded upon the ground that the failure of the verdict to so find worked no prejudice to the accused. *Burks v. State*, 326.

4. Though under an indictment charging the theft of cattle in the usual form, a conviction may be had either for the theft defined in article 749 of the Penal Code or for the misdemeanor of driving cattle from their accustomed range as defined in article 767 of the Penal Code, the verdict, to be sufficient, must show with reasonable certainty of which offense, the felony or the misdemeanor, the accused was found guilty. *Guest v. State*, 580.

5. When the indictment charges an offense which includes other offenses, and all the offenses covered by the indictment are submitted to the jury by the charge of the court, a general verdict of guilty, assessing a penalty applicable to either of the offenses, is uncertain, and will not support a judgment. The rule is that "when a verdict is so defective and uncertain that the court can not know for what offense to pass judgment, it should be set aside." The indictment in this case charged the accused with the felony of cattle theft, and also with the misdemeanor of driving cattle from their accustomed range. The verdict found the

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VERDICT—continued.

defendant "guilty as charged in the indictment," and assessed the penalty applicable as well to the misdemeanor as to the theft defined in the said article 749 of the Penal Code, and the court adjudged the conviction to be for the felony. *Held*, that the verdict was illegal in failing to designate the offense of which the jury found the accused guilty, and does not authorize the judgment. The verdict should not have been received, but, having been received, the trial court should have awarded a new trial. *Id.*

6. It is not essential, though proper, that the charge of the court should instruct the jury in the forms of verdicts which may be rendered by them; but, when such an instruction is given, it should embrace every verdict which might be rendered in the case. *Williams v. State*, 637.

VOLUNTARY RETURN OF STOLEN PROPERTY.

See THEFT, 44.

W.**WITNESS.**

1. Article 755 of the Code of Criminal Procedure provides that "the rule that the party introducing a witness shall not attack his testimony is so far modified as that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any other manner except by proving the bad character of the witness." *Held*, that before this rule can be applied, the witness must have stated some fact in evidence which was injurious to the cause of the party in whose behalf he was called to testify; and it is not enough that he merely made a statement different from that which the party had reason to and did believe he would make. *Bennett v. State*, 73.

2. The rule obtains in this State that if a party be bona fide surprised at unexpected testimony of his witness, he may be permitted to interrogate his witness as to his previous declarations inconsistent with his testimony,—the object being to test the witness's recollection, and to enable him, if mistaken, to review his evidence. Such corrective testimony is also admissible to explain the attitude of the party calling the witness; but if the sole object of the proffered testimony be to discredit the witness, it will not be received. *Id.*

3. While a full pardon, granted by competent authority, to one who has been convicted of felony, removes the legal odium from such person, and qualifies him to testify as a witness in the courts of this State, it does not remove the question of his credibility from the consideration of the jury; nor will it operate to prevent opposing counsel from urging in argument that, notwithstanding such pardon, the witness, by reason of his conviction for felony, is entitled to no credit. The trial court did not err in refusing to restrain the State's counsel in such argument. *Id.*

4. It is expressly provided by statute that "persons charged as principals, accomplices or accessaries, whether in the same indictment or different indictments, can not be introduced as witnesses for one another." *Gray v. State*, 611.

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WITNESS—continued.

5. On his trial for theft of lost property, the defendant offered one Nancy Gray as a witness in his behalf. The State objected to the competency of the proposed witness upon the ground that a separate indictment was pending against her, wherein she was charged with receiving and concealing the stolen property for the theft of which the defendant was on trial. The objection was sustained by the trial court. The evidence disclosed that the proposed witness was the mother of the defendant. In view of the rules above announced, it is *held* that, inasmuch as the witness was not charged as a principal, accomplice or accessory in the *theft*, she was a competent witness, and the trial court erred in holding her incompetent. *Id.*

WRITTEN INSTRUMENTS.

The duty of determining whether or not a written composition is indecent and obscene devolves upon the court and not upon the jury. The composition in this case, as set out in the indictment, and as adduced in evidence, consisted of the words, "Ass hole work." *Held*, that, in construing such composition to be obscene and indecent, and in so instructing the jury, the trial court did not err. *Smith and Coker v. State*, 1.

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